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ABSTRACT

This document reviews early "scope" litigation between Oregon teachers and school districts that set the underpinnings for the more recent decisions by the Employment Relations Board (ERB). These early cases worked in a dialectic fashion to bring Oregon scope of bargaining to the point it is today. As a result of the evolutionary process, the scope issues have declined in importance for employees and employers who have the statutory right to strike. The reasons that public safety issues are different for employers and their represented personnel are addressed. Finally, recent cases by the board as well as a labor and management view of the current state of the scope of bargaining obligation are examined. A table which sets forth a complete listing and brief descriptions of the scope cases which have come before the ERB is appended. (SI)

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Oregon's Scope Bargaining: From Schools to Public Safety

By

Kathryn T. Whalen and Les Smith

Issue No. 6

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L E R C M O N O G R A P H S E R I E S

Issue No. 6

OREGON'S SCOPE OF BARGAINING: FROM SCHOOLS TO PUBLIC SAFETY

by

Kathryn Whalen and Les Smith

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FOREWORD

The scope of bargaining, the subjects over which the parties can bargain in the employment relationship, is at the heart of the collective bargaining process. From a management view, what is bargainable defines or limits what remains as the prerogatives of the public sector employer. From a labor perspective it sets forth the essence of collective bargaining, defining in large part, what may be obtainable through this process for union members. The importance of this subject matter to both labor and management cannot be overstated.

As in the past, the Labor Education and Research Center has been fortunate in being able to draw upon two outstanding practitioners to author the current manuscript. Thoroughly researched, their work discusses at length many of the key decisions in which the Employment Relations Board and the courts have defined the Oregon Public Employee Collective Bargaining Act scope of bargaining. More importantly, the Monograph focuses upon the methodology which these tribunals employed to fashion the "balancing test" which they have used to reach their scope decisions. As advocates, the authors have also brought to bear their considerable skills in critiquing the ERB decisions and the "balancing test" approach as seen from their respective positions.

In the appendix to this Monograph the reader will find a table which sets forth a complete listing and brief description of the scope cases which have come before the Employment Relations Board to date. The table is based upon a similar table which first appeared in Oregon Labor Law Today by Hungerford and Bischof, published by Labor Law Publishing, Inc. of Sun River, Oregon. Permission for its use in developing the table presented here is greatly appreciated.

These comments would not be complete without acknowledging those who assisted in the various aspects of its publishing. First among these are the Monograph Editorial Board members who reviewed the manuscripts. David Looman of the LERC faculty assisted with various editorial tasks, as did copy editor, Barbara Hill. With the cooperation of Stephanie Poyser from Kathryn Whalen's office and Sheila Eadie from Les Smith's office, Barbara Oppliger coordinated the secretarial preparation of the Monograph and handled the arrangements with the University's Printing Department.

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DISCLAIMER

The views expressed by the authors of this monograph and its editor are their own. They do not necessarily represent those of the Labor Education and Research Center or the University of Oregon.

I. INTRODUCTION

In 1973, the Oregon legislature passed the Public Employe Collective Bargaining Act ("PECBA"). At its core is PECBA's requirement that public employers and labor organizations enter into good faith negotiations over matters concerning "employment relations". ORS 243.656. The legislature defined the term "employment relations" as including but not limited to "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." ORS 243.650(7).

Shortly after the passage of the PECBA, litigation commenced concerning the scope of this mutual bargaining obligation. Clearly, employers and unions had to bargain over the subjects specifically listed by statute as employment relations. However, questions were raised as to what subjects were under the catch-all phrase "conditions of employment"? More specifically, which conditions of employment constituted mandatory subjects of bargaining and which were permissive in nature? The focal point of this paper is the present "state of affairs" with respect to the scope of bargaining question.

In order to place current developments in perspective, we will review early "scope" litigation between teachers and school districts which set the

underpinnings for the more recent decisions by the Employment Relations Board (ERB or Board). 1/ We will explain how these early cases worked in a dialectic fashion to bring Oregon scope of bargaining to the point it is today. We will discuss why, as a result of this evolutionary process, scope issues have declined in importance for employes and employers who have the statutory right to strike. Then, we will turn our attention to the area in which scope questions continue to be important--public safety. We will address why scope issues are different for public safety employers and their represented personnel. Finally, we will examine recent cases by the Board in the scope area; and we will provide both a labor and management view of the current state of the scope of bargaining obligation.

II. SCOPE OF BARGAINING: THE EARLY YEARS

A. The "Roots" of the Bargaining Obligation

1. The Federal Connection

The Oregon PECBA is patterned in many respects after the federal Labor Management Relations Act (LMRA), 29 U.S.C. Section 141, et. seq. Klamath Co. v. Laborers International Union of North America, Local No. 915, 21 Or App 281, 534 P2d 1169 (1975); Corvallis Education Association v. Corvallis School District, 35 Or App 531, 581 P2d 972 (1978); Siegel v. Gresham Grade School District, 32 Or App 541, 547 P2d 692 (1978); Portland Association of Teachers v. Portland School District, 51

Or App 321, 625 P2d 1336 (1981). Drawing upon private sector experience, the Oregon legislature enacted a collective bargaining law which contains policy considerations and provisions similar to the LMRA, e.g., compare ORS 243.662 and LMRA Section 1; ORS 243.662 and LMRA Section 7; ORS 243.672 and LMRA Section 8; ORS 243.650(7) and LMRA Section 8(d). One element which is of paramount importance under both laws is the obligation to bargain in good faith. The provisions of the LMRA and the Oregon law which pertain to the scope of this obligation are broadly drafted, and leave considerable room for interpretation. 2/ Therefore, it was only natural that ERB looked to private sector precedent for assistance in setting the guiding principles for further defining the bargaining obligation. See Springfield Education Assn. v. Springfield School District No. 19, 1 PECBR 347, 349-50 (1975).

2. The Fundamentals

In its first decisions interpreting the scope of the bargaining obligation under Oregon law, the Board adopted the private sector 3/ distinction between mandatory/permissive and prohibited subjects of bargaining. Springfield Education Assn. v. Springfield School District No. 19, supra; Eugene Education Assn. v. Eugene School District No. 4J, 1 PECBR 446 (1975); South Lane Education Assn. v. South Lane School District No. 45J, 1 PECBR 459 (1975); cases consolidated and aff'd in part, 24 Or App 751, 547 P2d 647, reconsidered 25 Or App

407, 549 P2d 1141 (1976), on remand 3 PECBR 1950 (1978), Supreme Court review after remand, 290 Or 217, 621. P2d 547 (1980). That is, a prohibited item for bargaining is one which would require either party to perform an illegal act. Springfield Education Assn. v. Springfield School District No. 19, supra at 350. A permissive item is one which falls within the scope of the managerial or proprietary prerogatives of an employer or union. Thus, either party may agree to talk about a permissive subject but is not required to do so. Id. Lastly, a mandatory subject is any proposal within the definition of employment relations which is neither prohibited nor permissive. Id. The parties must bargain over mandatory items. Id. However, this mandatory obligation does not require a party to agree to any proposal, but only that it engage in good faith discussions concerning the subject. Id.

In addition to making these distinctions, the Board, in Springfield/Eugene/South Lane, set forth its approach for determining which subjects fall within the statutory definition of "employment relations," thereby becoming mandatory items for bargaining. Springfield Education Assn. v. Springfield School District No. 19, supra at 349. Although acknowledging that different proprietary interests exist in the public sector, the Board again drew from precedent under the federal law. See e.g., John Wiley & Sons v. Livingston, 376 U.S. 543, 549, 55 LRRM 2769 (1964). The ERB adopted a "balancing

test" by which it determines whether a bargaining proposal is mandatory or permissive by weighing its effect on management prerogatives versus its effect on employes' conditions of employment. Springfield Education Assn. v. Springfield School District No. 19, supra at 349. If a proposal affects management's prerogatives to a greater extent than employe working conditions, it is permissive; if the contrary is true, then the proposal is mandatory. Springfield Education Assn. v. Springfield School District, 290 Or 217, 234, 621 P2d 547 (1980).

As the Board has analogized, the balancing test can be thought of as a "teeter-totter". East County Bargaining Council v. Centennial School District, ERB C-185-82, 6 PECBR 5630 (1983). On one end of the seesaw is a public employer and on the other end sits the represented employes. Id. Prior to bargaining, the parties weigh the same; and therefore the seesaw is balanced. Id. Then, a bargaining proposal is dropped onto the seesaw. Id. at 5630-31. If the proposal has a greater effect on management prerogatives than employes' working conditions, the proposal lands on the employer's side of the seesaw, which causes the employer to teeter toward the ground while the employes totter upward. Id. at 5631. Such a proposal is permissive. If the proposal has a greater effect on employes' conditions of employment than it has on management prerogatives, the proposal lands on the employes' side of the seesaw, which

causes the employes to teeter toward the ground while the employer totters upward. Id. at 5631. That proposal is mandatory. Id.

One can argue that the balancing test is a sensible method for resolving issues which, by their very nature, demand a case-by-case analysis. Due to the inumerable factual variations with respect to the parties involved and their bargaining proposals, the Board needs a flexible avenue for deciding scope issues. On the other hand, it is important to realize that the ERB's balancing approach is a subjective test. No objective source offers guidance as to how to weigh the balance. Who drops the proposal onto the seesaw may be the decisive factor. The balancing test can serve as a superficial framework for rationalizing or stating a result. Yet, despite its drawbacks, the Oregon Supreme Court has found this approach to be a permissible interpretative tool for determining the range of mandatory items. Id. Thus, from the early trilogy of the Springfield/Eugene/South Lane cases emerged these rather amorphous "scope" guideposts to which the Board is wedded today.

B. The Evolution of Scope of Bargaining

The Springfield/Eugene/South Lane trilogy not only established scope of bargaining guidelines, these cases also decided whether some 92-odd items were permissive or mandatory subjects of bargaining. Springfield Education Assn. v. Springfield School

District No. 19, supra at 347. The Board's decision on a number of these items became the impetus for further litigation, which in turn led to further elaboration of the mandatory/permissive distinction and brought more sophistication to the bargaining process.

1. Scope Decisions Concerning Job Security

(a) Teacher Evaluation

In the Springfield/Eugene/South Lane cases the Board ruled that union proposals concerning the evaluation of teachers were permissive subjects of bargaining. Springfield Education Assn. v. Springfield School District No. 19, 1 PECBR at 354; Eugene Education Assn. v. Eugene School District No. 4J, 1 PECBR at 456-57; South Lane Education Assn. v. South Lane School District No. 45J, 1 PECBR at 469-70. Instead of using its newly adopted balancing test, the Board simply concluded that by Oregon statute (The Fair Dismissal Law),4/ teacher evaluation was a management prerogative, and thus not mandatory. Id. The Oregon Court of Appeals disagreed with ERB's conclusion that a subject becomes a permissive item by reason of statutory preemption. Springfield Education Assn. v. Springfield School District, 25 Or App 407, 410, 549 P2d 1141 (1976). Also see, Springfield Education Assn. v. Springfield School District, 24 Or App 751, 547 P2d 647 (1976); Sutherlin Education District No. 130, et al., 25 Or App 85, 548 P2d 204 (1976). On remand, the Board applied its balancing test, and came up with a three-part framework for

analyzing teacher evaluation proposals. Springfield Education Assn. et. al. v. Springfield School District No. 19, 3 PECBR 1950 (1978). According to the ERB, the subject of teacher evaluation has three subparts: (1) the bases (or criteria) for conducting evaluations and the use to which evaluations are put; (2) the mechanics (or format) of conducting teacher evaluations; and (3) minimum fairness procedures designed to insure teachers of proper notice of evaluations and an opportunity to respond to completed evaluation reports. Id. at 1957. ERB concluded that proposals falling within the first two subparts were permissive items, but that "minimum fairness procedures" were mandatory subjects of bargaining. Id. at 1957-58.

On appeal, the Court of Appeals affirmed the Board's decision; however, the Supreme Court modified ERB's opinion in one respect. Springfield Education Assn. v. Springfield School District, 3 PECBR 1950 (1978), aff'd 42 Or App 93, 600 P2d 425 (1979); modified 290 Or 217, 621 P2d 547 (1980). The Court concluded that on balance, the union's proposal which provided that "criteria for the evaluation of all teachers shall be clearly defined" was a mandatory, rather than permissive subject of bargaining. Springfield Education Assn. v. Springfield School District, 290 Or at 239-40. The Court reasoned that requiring clarity in the definition of criteria was akin to a "fairness" procedure, and was not

similar to bargaining over the substance of evaluation criteria. Id. at 240.

In response to the above-described rulings, unions in the public sector reacted in at least two ways. First, in negotiations with management, the union(s) proposed language that provided simply that teacher evaluation criteria "shall be clearly defined". Once in the contract, such language could be grieved and ultimately interpreted by an arbitrator. Thus, by purposely leaving the language ambiguous, a union had the opportunity to arbitrate what requirements were necessary to meet the standard of "clearly defined". Second, the Oregon legislature passed amendments to the teacher evaluation provisions of the Fair Dismissal Law, ORS 342.850. The amendments placed into effect evaluation requirements similar to those previously found by the Board to be permissive subjects of bargaining. See ORS 342.850. Following this change in the law, teacher unions made proposals to incorporate into the labor agreement the statutory evaluation requirements.

In East County Bargaining Council v. Centennial School District, C-185-82, 6 PECBR 5556 (1982), the Board faced the issue of whether a proposal mimicking the statutory requirements for teacher evaluation was a mandatory or permissive subject of bargaining. The Board was not persuaded by the Union's argument that because the proposal paralleled statutory provisions it was mandatory. Id. at 5564. In fact, ERB stated that the

statutory argument was "largely irrelevant in determining the bargainability of proposals". Id. at 5564. The Board proceeded to use its three-part evaluation framework (i.e., bases and use, mechanics and minimum fairness procedures) and "balanced" the proposals. ERB concluded that parts of the teacher evaluation proposals were mandatory, and parts were permissive. Id. at 5564-67. On appeal, the Court of Appeals affirmed the Board. The Oregon Supreme Court, however, reversed and remanded the case to ERB. East County Bargaining Council v. Centennial School District, 69 Or App 47, 685 P2d 456 (1984); 298 Or 146, 689 P2d 958 (1984). The Supreme Court said that the Board's decision was based on the faulty assumption that contract remedies would be an additional forum for enforcing the statutory evaluation procedures. East County Bargaining Council v. Centennial School District No. 28JT, 298 Or at 148. The Court pointed out that based upon a recent ruling of the Court of Appeals, Smith v. School District, 63 Or App 685, 666 P2d 1345, rev. den. 295 Or 773 (1983), there was no legal remedy for violations of the statutory procedures. Id. On remand, the Board again performed its balancing test taking into account the fact that there was no legal remedy for enforcing the statutory requirements for teacher evaluations. East County Bargaining Council v. Centennial School District No. 28JT, 8 PECBR 6776 (1985). The Board concluded that the lack of enforceability of

ORS 342.850 tipped the balance toward the mandatory side of the bargaining seesaw. Id. at 6781.

Thus, after approximately nine years of litigation the final word on teacher evaluation was spoken. This chronology of events surrounding the subject of teacher evaluation is important in a number of respects. Obviously, the litigation in this area shows the early state of flux of scope of bargaining issues. Because the Board has so much latitude in defining the scope of the bargaining obligation under the Oregon PECBA, its approach to resolving such questions had to be thoroughly tested through the judicial system. In addition, and equally important, the teacher evaluation issue demonstrates bargaining strategies for the labor practitioner when faced with a permissive proposal. In the situation where language containing specific requirements has been deemed permissive, one alternative is to draft the proposal in broad, mandatory terms which allows for interpretation by an arbitrator. With such an approach, the practitioner will have another forum, arbitration, for arguing for its desired interpretation. Finally, the teacher evaluation issue illustrates the possible, albeit often difficult, approach of changing the status of a bargaining subject through legislation.

In sum, the litigation surrounding teacher evaluation shows that at the inception of the balancing test, the Board did little by way of a balancing analysis. The Board's opinions for the most part were

conclusory. However, by the time the teacher evaluation issue surfaced in East County Bargaining Council, the Board's opinions contained a much more detailed balancing process. Compare: Springfield Education Assn. v. Springfield School District No. 19, 1 PECBR 347, 354-55 (1975) with East County Bargaining Council v. Centennial School District No. 28JT, 6 PECBR 5556, 5564-67 (1982), on remand 8 PECBR 6776 (1985). For this reason, the teacher evaluation cases are a good example of the evolution of the balancing test and the mandatory/permissive distinction, and the corresponding adaptations in the bargaining process. This example can be said to carry over or at least be the starting point for the analysis of any issue that gets caught in the maze of the mandatory/permissive distinction.

(b) Just Cause

Another bargaining issue concerning job security which initially was decided by the Board in the Springfield/Eugene/South Lane trilogy involved a proposal calling for "just cause" for discipline. 5/ See e.g. Eugene Education Assn. v. Eugene School District No. 4J, 1 PECBR 446, 448 (1975). The Board concluded that such a proposal was a mandatory subject of bargaining. Id. In a subsequent case, Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Fred Larson, 5 PECBR 2771 (1980), the Board further elaborated upon the just cause issue. ERB found that although a proposal such as the one in the Eugene case is a mandatory item,

language which attempts to define just cause is not. Id. at 2780-81. The union's response to this ruling was similar to their response regarding the teacher evaluation issue. The teacher unions simply proposed "just cause" language without definition, leaving its refinement in the hands of an arbitrator. As a result, the Gresham case's restrictive approach to just cause has had little effect on its status as a bargaining subject. Additionally, in recent cases, the Board has reaffirmed its original ruling that just cause is a mandatory subject. See OSEA v. Klammath County School District, ERB Case No. C-127-84, 9 PECBR 8832 (1986), (appeal pending); ONA v. Eastern Oregon Psychiatric Center, 9 PECBR _____ (Dec. 1986). Furthermore, in a Recommended Order just issued in February of this year, the Board expressly overruled the Gresham case's holding that language attempting to define just cause is permissive. Multnomah County Corrections Officers Association v. Multnomah County Sheriff's Office et al., Case No. UP-21-86 (Feb. 13, 1987). Although objections to the recommended order have been lodged, it is likely that the full Board will adopt the rulings of the Board Agent on this matter.

Thus, once again, in a situation where specific language was deemed permissive, the solution for the party wishing to bargain over the subject was to propose broad, mandatory language. The just cause cases also show that scope of bargaining rulings can and do

flucuate. Practitioners should not be reluctant to challenge Board rulings they believe to be unsound. The Board has demonstrated it has an open ear.

(c) Reduction in Force: Order of Layoff and Recall

Another job security issue involving the question of mandatory versus permissive subjects recently was addressed by the Board. In 1981, ERB was presented with the question of whether proposals regarding the order of layoff and recall were mandatory subjects of bargaining. See Eugene Education Assn. v. Eugene School District No. 4J, 6 PECBR 4849 (1981) and Greater Sweet Home Area Education Assn. v. Sweet Home School District, 6 PECBR 4832 (1981).

In the Greater Sweet Home case, the Board found that for school employers a reduction in force proposal which is based strictly on seniority is a prohibited subject of bargaining. Id. at 4836. The Board reasoned that such a proposal contravened reduction in force provisions of the Fair Dismissal Law (ORS 342.865(1)(j)) which requires merit and seniority to be considered in such a situation. Id. at 4836-37. However, in a case decided that same month, the Board also ruled that proposals regarding the order of layoff and recall which are drafted consistent with the Fair Dismissal Law, are mandatory subjects of bargaining. Eugene Education Assn. v. Eugene School District No. 4J, 6 PECBR at 4856-57.

Recently, the Board reaffirmed its rulings in the Eugene and Greater Sweet Home cases by summing up its decisions on layoff and recall as follows:

> The subject of layoff and recall is a mandatory subject of bargaining (citations omitted). Where the subject of layoff and recall also is governed by a statute, a proposal on the topic still is mandatory unless it conflicts with the statute, in which case it would be prohibited. (emphasis added)(citations omitted) Springfield Education Assn. v. Springfield School District No. 19, 7 PECBR 6357 (1984).

Thus, absent inartful drafting, proposals generally involving the layoff and recall of public employes are mandatory subjects.

2. Scope Decisions Regarding Teacher Workload: Class Size and Student Contact Time

Another subject area in which early cases played a key role in developing bargaining strategies and in further differentiating between mandatory and permissive items was the area of teacher workload. This topic primarily consists of two subject categories: student contact time and class size.

In the Springfield/Eugene/South Lane cases the Board made its first rulings on these issues which essentially remain intact today. Springfield Education Assn. v. Springfield School District No. 19, 1 PECBR at 358, 361. Also see Gresham Grade Teachers Assn. v. Gresham Grade School District No. 4 et al., 5 PECBR 2889 (1980), aff'd but remanded for recon. on remedy, 52 Or App 881, on remand 6 PECBR 4953 (1981). The Board found

the subject of class size to be permissive, but decided that a teacher's contact time with students is a mandatory subject of bargaining. 6/ Id. Class size, the Board reasoned, is beyond the control of the school board and has a broad impact on the economics of school administration. Id. at 358. On the other hand, the Board concluded that student contact time has a direct relationship to a teacher's conditions of employment.

In response to the Board's permissive ruling on class size, teacher unions drafted proposals which called for an increase in wages (premium pay) for increasing class size. The ERB found these proposals to be mandatory, e.g., see Gresham Grade Teachers Association v. Gresham School District, No. C-61-78, 5 PECBR 2771, 2786 (1986). Once such language is negotiated into a labor agreement it has the effect of curtailing increases in class size in that if the school district wants to increase class size, it must pay existing teachers higher wages or hire more teachers. Obviously, these provisions have a direct effect on the district's economic situation. Therein lies a paradox which permeates many scope cases. The Board has determined that class size is a permissive subject of bargaining because it impacts upon the economics of a school district. However, as demonstrated above, premium pay for increases in class size also directly effects the economic situation of school administration; yet such a proposal is mandatory.

There seems to be a distinction without a difference in these rulings.

3. School Calendar/Teacher Workday

As may be obvious from the discussion of the above cases, one of the most effective ways to avoid or to combat a permissive scope ruling is to draft or recast a bargaining proposal so that the language proposed is mandatory. Perhaps one of the best demonstrations of this tactic is presented by the scope litigation regarding school calendar/teacher workday.

In the early scope cases teacher unions presented proposals which set forth the days worked in the calendar year. See Springfield Education Assn. v. Springfield School District No. 19, 1 PECBR at 362-63; Eugene Education Assn. v. Eugene School District No. 4J, 1 PECBR at 449; South Lane Education Assn. v. South Lane School District No. 45J, 1 PECBR at 462. The Board, in the Springfield/Eugene/South Lane trilogy held that such proposals concerned the "school calendar" and therefore were permissive subjects of bargaining. Id. In reaching this conclusion, the Board rationalized that the school work year is set by state standards. Springfield Education Assn. v. Springfield School District No. 19, 1 PECBR at 36. Furthermore, the Board stated that the calendar is set by many outside influences such as weather and agricultural considerations. Finally, the employer has a "policy duty" to adopt the calendar in

consultation with patrons of the school district. 1 PECBR at 363.

The teacher unions responded to the Board's ruling by attempting to "break down" the school calendar into mandatory components. They drafted proposals concerning spring and summer vacations, the number of holidays, the number of workdays, and the number of preparation days. In Eugene Education Assn. v. Eugene School District No. 4J and Richard Miller, 4 PECBR 2413 (1979), reversed and remanded 46 Or App 733 (1980), on remand 6 PECBR 4653 (1981), some of these proposals were tested. Specifically, in the Eugene case, the union advanced proposals on the subjects of "summer vacations", teacher workdays, and teacher preparation days. Id. at 46 Or App 735-36. The school district refused to bargain over the proposals claiming they were in reality school calendar proposals and therefore permissive. Id. at 46 Or App 736. The Board agreed. Id. The Court of Appeals agreed in part with the Board, but reversed with respect to certain of the "summer vacation" proposals 7/ Id. The Court held that two of the union's proposals on this issue which dealt with an amount of unpaid vacation during the summer, fell within the express term of "vacations" contained in the statutory definition of "employment relations" (ORS 243.650(7)). As such, they constituted mandatory subjects of bargaining. Id. at 46 Or App 740.

Thus, even though the labor organization in the Eugene case could not directly bargain over the number of teacher workdays and preparation days, or the beginning and end of the work year; its proposal concerning the amount of unpaid summer vacation was held to be mandatory. By proposing blocks of unpaid vacation time the union in Eugene was able to regulate, indirectly, the number of days worked. Hence, the Eugene case demonstrates how careful drafting of bargaining proposals allows a party to achieve some control over subjects which have been declared permissive.

C. Scope of Bargaining in Mediation, Factfinding and Interest Arbitration

Under the Oregon PECBA it is an unfair labor practice for a party to pursue a permissive or prohibited subject of bargaining into factfinding. Oregon City School District v. Oregon City Education Assn., Case No. C-179-79, 5 PECBR 4246 (1981). It also is an unfair labor practice for a party to take a permissive subject into interest arbitration if the other party has made a timely objection to the proposal's permissiveness. See IAFF Local 696 v. City of Astoria, C-72-84, 8 PECBR 6604 (1984)(Interest arbitration award enforced where employer failed to declare proposal permissive). Similarly, employes who have the right to strike under the Oregon PECBA cannot do so over a permissive or prohibited item. See Redmond Education Assn. v. Redmond School Dist. 2J, C-164-77, 3 PECBR 1611 (1977). However, the Board has

ruled that merely proposing a permissive subject in mediation is not an unfair labor practice, because mediation is a continuation of negotiations between the parties. Oregon City School Dist. v. Oregon City Education Assn., supra at 5 PECBR 4254, 4255. Still, even in mediation, the Board will find a violation of ORS 243.672(1)(e) or (2)(b) if a party preconditions a bargain upon the inclusion of a permissive subject in a collective bargaining agreement, or insists that a permissive subject be discussed before the negotiation of mandatory items. Id. at 5 PECBR 4255. In fact, doing so at any stage in the process may result in the finding of an unfair labor practice. Id. The ERB has explained its reasoning concerning these matters as follows:

> Many, perhaps even a majority, of the collective bargaining agreements negotiated under the PECBA include articles that deal with what are arguably permissive bargaining subjects. This circumstance is the result of the willingness of a party (most often an employer) to negotiate solutions to problems and thereby 'alleviate various forms of strife and unrest.' ORS 243.656(2). It is not a purpose of the PECBA to prohibit such voluntary bargaining over permissive items. To allow a party to be forced, at any stage of the negotiations process, to involuntarily bargain over permissive issues, however, would seriously interfere with the more specific purposes of the statute, which are to obligate all parties initially to negotiate over employment relations and ultimately to reach agreement on such mandatory matters. Oregon City School District v. Oregon City Education Assn., supra at 5 PECBR 4255

The issue of whether a party is "merely proposing and urging" negotiations on a permissive item, or "unlawfully pursuing" a permissive subject is a question of fact to be decided by the ERB on a case-by-case basis. Oregon City School Dist. v. Oregon City Education Assn., supra at 5 PECBR 4255.

The above rules which have developed regarding scope issues in mediation, factfinding and interest arbitration are very important to the labor practitioner. "Unlawfully pursuing" a permissive item can have serious implications, particularly for labor organizations. If a union preconditions an agreement on a permissive subject, the Board may disregard a factfinder's report and/or an interest arbitration award. See discussion infra at 44-45; also see Redmond Education Assn. v. Redmond School Dist. 2J, C-164-77, 3 PECBR 1611 (1977). Furthermore, for employes who have the right to strike, unlawfully pursuing a permissive subject may result in the Board finding the strike to be unlawful. Yoncalla School District v. Lane Unified Bargaining Council, C-113-83, 7 PECBR 5867 (1983); Redmond Education Assn. v. Redmond School Dist. 2J, C-164-77, 3 PECBR 1611 (1977). Thus, it is important that practitioners keep well-informed of the Board's rulings in this area, and tailor their conduct in negotiations and the dispute resolution process accordingly. Also, because of the possible harsh results primarily on labor organizations, if there is doubt as to whether a proposal is mandatory or permissive, it is

incumbent upon unions to take the issue to the ERB before factfinding or suffer the consequences of a permissive finding by the Board. That is not to say that permissive proposals cannot be raised or bargained at the table. Parties simply must make sure their conduct falls within the parameter of the Board's pronouncements in this area.

D. The Decline In Importance of Scope Issues for Employes Who Have the Statutory Right to Strike

After the flurry of litigation regarding the scope of the bargaining obligation in the early years, there has been a steady decline in such issues, particularly for employes who have the statutory right to strike. There are a number of factors which have contributed toward this decline.

First of all, as a result of the early litigation involving bargaining in the schools, many bargaining subjects simply have been identified as mandatory, permissive or prohibited subjects of bargaining. (See chart at end of monograph.) Second, through numerous climbs up the judicial ladder, the Board's balancing test has become much more sophisticated. Instead of broad-reaching conclusions, ERB's decisions generally contain a more comprehensive balancing analysis based upon the particular facts of the case. Such decisions do not encourage litigation, because the courts, especially with respect to factual findings by the ERB, exercise a very limited scope of review over ERB orders. 8/

Last, and perhaps most important, labor and management practitioners also have become more sophisticated. The rules of the game are now well-known to employers and unions, and their respective negotiating strategies have adapted to the law.

For example, employers realize that they can bargain over a permissive item and "just say no". Nothing requires either party to agree to any proposal. The parties both know that they are also at risk by continued insistence on a subject declared permissive by the other party. A wrong guess, once the parties move to factfinding or toward economic action such as a strike, will subject the side making the wrong guess to an unfair labor practice charge and create the possibility that the economic activity is likewise a form of an unfair labor practice.

An approach that further neutralizes the issue is a bargaining tactic by unions which offers "alternative packaging." That is, when faced with a claim by an employer that a particular subject is permissive, the union responds by stating that it is concerned with the "total value" of the package. The total value can consist of mandatory and some permissive items, or all mandatory items. However, the "total value" must be there. In response, employers may well recognize that a total package with a few permissive items is not such a bad compromise.

Finally, as mentioned previously, the permissive "problem" can either be avoided altogether or overcome by simply recasting or drafting proposals in mandatory terms. The most common approach is to tie compensation or benefits to the proposal in some way. Thus, much like the private sector, scope of bargaining questions under the Oregon PECBA generally are not the "burning" issue that they once were. Having made this statement, however, it is necessary next to discuss the primary exception: the area of public safety. For it is in this area that scope of bargaining questions continue to be important.

III. SCOPE OF BARGAINING TODAY

A. Special "Scope" Considerations for Public Employes Who Are Prohibited from Striking

Under the Oregon PECBA, emergency telephone workers, police officers, fire fighters and guards are prohibited from striking. See ORS 243.736. 9/ As a quid pro quo for not having the right to strike, the PECBA provides binding interest arbitration for such employes. See ORS 243.742. It is this fact alone, the existence of binding interest arbitration, which gives scope issues in the area of public safety continued importance. Employers do not want third parties rendering decisions on items which are permissive. At the point in which PECBA's dispute resolution processes of factfinding and arbitration commence, public safety employers cannot

"just say no" and effectively protect their management rights. From an employer's point of view, awards which include permissive items interfere with their ability to manage and control their public enterprise. On the other hand, unions representing public safety personnel may want to take any unresolved issues to factfinding and interest arbitration, as they may gain favorable contract terms in areas in which they have been unsuccessful in negotiations. Thus, it is no surprise that nearly all of the more recent scope cases concern public safety personnel.

B. Recent Developments

1. Release Time for Union Business: The City of Portland Case

(a) Background

The Board issued a controversial ruling regarding release time for union business in September, 1985. City of Portland, ERB DR-4-85, 8 PECBR 8115 (1985). The case arose out of the City's demand that in exchange for the City paying one-half of the police association president's salary, he also work for the City half time. Prior to the City's demand, the union president, Stan Peters, allegedly worked exclusively for the union. The City petitioned ERB for a declaratory ruling that the City was prohibited from paying Peters' salary since, according to the City, he performed no work for the City. Before discussing the case in detail,

however, it is important to review ERB's prior rulings concerning release time.

The critical inquiry when faced with a union leave proposal is whether the proposal constitutes lawful cooperation with a labor organization (and therefore is mandatory), or whether it constitutes unlawful assistance in violation of ORS 243.672(1)(b). 10/ See: Springfield Education Assn. v. Springfield School District No. 19, 1 PECBR 347, 355 (1975); OSEA v. School District 9 of Jackson Co., C-204-78, 4 PECBR 2352 (1979). Prior to the City of Portland case, the Board followed a two-part test for determining whether a union leave proposal or contract provision was a mandatory or prohibited subject of bargaining. The Board analyzed the language at issue to determine (1) the labor organization purposes to be served; and (2) the probable effect on the employes' ability to freely choose a representative if the assistance is given. See OSEA v. Jackson County School District, supra, Eugene Education Assn. v. Eugene School District, C-93-79, 5 PECBR 3004 (1980). With respect to the first part of the test, ERB has ruled that a proposal is not a prohibited subject of bargaining if it concerns only matters directly related and central to the collective bargaining relationship between the employer and the union. Eugene Education Assn. v. Eugene School District, supra at 3008. Consequently, proposals for paid employe release time to serve on a negotiating team

or to process grievances are mandatory items. OSEA v. School District 9 of Jackson County, supra; Clackamas Intermediate Education Association v. Clackamas Intermediate Education District, Case No. C-141-71, 3 PECBR 1848 (1978). On the other hand, release time (with or without pay) to attend meetings of union affiliates or to serve as an officer of an affiliate constitute unlawful assistance and are prohibited subjects of bargaining. Eugene Education Assn. v. Eugene School District No. 4J, supra. In the City of Portland case, the Board majority (Member Hein dissenting) went beyond its prior rulings in the release time area, and appears to have opened up the proverbial Pandora's box.

(b) The Facts and Conclusions of the City of Portland Case

According to the facts alleged by the City, Stan Peters (Peters) was employed by the City as a police officer, and also held the position of President of the Portland Police Association (Association) since at least 1974. 11/ City of Portland, DR-4-85, 8 PECBR at 8115. Under the terms of the parties' labor agreement the Association reimbursed the City for one-half of Peters' salary, based upon the recognition that typically half of his time was spent solely on Association business. Id. at 8116. The contract also provided that Peters remained eligible for and received all fringe benefits offered by the City while serving as President of the Association. Id. The City also

alleged in its petition that since 1981, and until July 15, 1985, Peters performed no work, service or labor for the City as a police officer. Id. at 8117.

In late June of 1985 the new police chief, Penny Harrington, ordered Peters to report to work for the assignment of police duties. Id. at 8117. Peters announced that he would disobey the order and a dispute developed between the City and Peters regarding the Chief's order. Id. The City and Association attempted to resolve the dispute and proposed amendments to the contract's provisions regarding leave for "Association Business". The parties essentially were in agreement except for the issue of fringe benefits. Id. at 8118-19. The Association proposed that the City continue to provide all fringe benefits to Peters while the City proposed that the Association carry the financial costs of Peters' fringe benefits, and that no vacation, holiday or sick time accrue. Id. at 8119-8120. The City claimed that the Association's proposal was a prohibited subject of bargaining because it constituted unlawful assistance by an employer to a labor organization. Id.

A majority of ERB agreed with the City; it ruled that both the current contract provisions regarding "Association Business" and the Association's proposal constituted prohibited subjects of bargaining. Id. at 8121. The Board concluded that the proposals were prohibited subjects of bargaining for two primary

reasons. City of Portland, 8 PECBR at 8125. First, the proposals would violate Article XI, Section 9 of the Oregon Constitution as well as Public Finance Statutes by requiring a public employer to expend funds to support an individual's employment with another employer, in this case, the Union. Id. at 8125. Second, the Board concluded that the City would be contributing toward the salary of a union employe which would "run afoul" of the assistance prohibition of ORS 243.672(1)(b). Id. at 8124-25. The Board expressly recognized that its conclusion went beyond its previous tests for determining what constitutes "unlawful assistance" under the PECBA, even though such standards had "served adequately to differentiate between unlawful assistance and lawful cooperation" in the past. Id. at 8123. Despite these prior standards, the Board majority agreed with the City that it would be illegal for the City to expend funds where the recipient of those funds is a full time union officer over whom the City exercises no control and from whom the City receives no work. Id. at 8123.

Member Hein dissented from the conclusions and reasoning of the majority in the City of Portland case. Under the Board's precedents, Member Hein would have upheld the pertinent contract provisions and would have found the Association's proposals concerning fringe benefits to be mandatory. Id. at 8125. Applying the Board's traditional "purpose" and "probable effects"

analysis, Member Hein concluded that the contract provisions at issue appeared to have a "direct relationship to labor-management relations between the union and the employer"; therefore, it concerned lawful cooperation. Id. at 8126. Member Hein also reasoned that there was no allegation that the provisions had had any actual effect on the ability of Portland Police Officers to freely choose their exclusive bargaining representative or their ability to fully participate in union activities. Id. at 8127. Therefore, there was no basis for concluding that the provisions constituted unlawful assistance under the PECBA. Id. at 8127. Furthermore, Member Hein noted the difficult line-drawing test embarked upon by the majority.

> The City argues, however, that the provisions at issue should be distinguished from those in prior cases on the basis that the direct financial assistance to the union required by the provisions is greater than that required by the proposals in other cases. I am not disposed to establish arbitrary lines based on dollars spent which would result in the same conduct (financial assistance) being unlawful in one instance and not another. Id. at 8126. (emphasis added).

Hein further elaborated:

> I do not see a substantive difference between an employer paying a number of employes while they engage in union activities for brief--but unlimited in number--periods and an employer paying one individual while he engages in union activities for a lengthy--but limited in term--period. In fact, I believe that it is the very length of the paid--or partially paid--leave for the Association President that has led my colleagues to err. Id. at 8129.

The City of Portland case is of some significance to labor practitioners. Whether a given release time or other union business proposal is prohibited may depend on the extent or degree of assistance to the union. Like the Board's balancing test, this approach is subjective and the result may well depend upon who is making the decision. Accordingly, at the present time, practitioners have little guidance as to what constitutes unlawful assistance versus lawful cooperation under Oregon law. Unions can expect more challenges to their release time bargaining proposals and contract provisions, as employers test the limits of "unlawful assistance".

2. Vacations or Staffing? Hours or Assignment of Personnel? The Portland Fire Fighters Case and the Oregon State Police Case

(a) Background: Subjects Specifically Enumerated As "Employment Relations" Under the PECBA

In Springfield Education Assn. , et al. v. Springfield School District, No. 19, 290 Or 217 (1980) the Oregon Supreme Court described ERB's responsibility with respect to interpreting the definition of "employment relations" under the Oregon PECBA. Id. at 233. The Court stated:

> The wording of subsection (7) indicates that the legislature chose to define 'employment relations' by example, but did not use an exhaustive list of examples. Rather, it used a general term, 'other conditions of employment,' intended to allow ERB to include other subjects of like character.

> The legislature expressed its policy choice by listing definitional examples. The reference to "other" such subjects was not a delegation to ERB to make different choices; rather, it is, in effect, a direction to ERB to replicate the same choice by regarding as 'employment relations' only those subjects which embody the same characteristics as 'monetary benefits, hours, vacations, sick leave, grievance procedures,' and no others. The question of whether any subject is like or unlike the listed matters is one of interpretation, not of discretion. . . . Id. at 233 (emphasis added).

It is clear from the Court's opinion in Springfield that ERB does not have the authority to substitute its judgment for that of the legislature's with respect to the listed mandatory subjects in the definition of "employment relations". In other words, where the legislature has identified specific subjects as "employment relations" its determination cannot be second-guessed by ERB. The Board has acknowledged this limitation on its interpretive authority. For example, in Int'l Association of Fire Fighters Local 314 v. City of Salem, ERB No. C-61-83, 7 PECBR 5819 (1983) aff'd 68 Or App 793 (1984), ERB explained that with respect to the specifically enumerated subjects of ORS 243.650(7) the "legislature in effect already has struck a balance and has decided that these subjects have a greater effect on working conditions than management's rights". Id. at 5825.

At the heart of the "scope" dilemma, however, is the problem concerning the interpretation of the nebulous term "other conditions of employment". To make

matters even more confusing, ERB has also been confronted with interpreting what is within the definition of the specific subjects of monetary benefits, hours, vacations, sick leave and grievance procedures. ORS 243.650(7). For example, in order to characterize a proposal as mandatory, a party may label a proposal as a "grievance procedure" proposal or a "hours" proposal when in reality the proposal is something different. The proposal simply is not what it purports to be. See Eugene Education Assn. v. Eugene School District, 58 Or App 32 (1982)("grievance" proposal did not concern "grievance procedure" and thus was not a mandatory subject of bargaining). According to ERB's analysis, the proposal is a disguised attempt to force bargaining over a permissive item. Id. Out of this analysis arose a "second" balancing test.

(b) The "Second Balancing Test": Finding the True "Nature" of a Proposal

In Int'l Association of Fire Fighters Local 314, supra, the Board first announced its second balancing test. In its opinion, the Board explained that there are two types of issues presented by a scope of bargaining case. Id. at 5824. First, there is the question of whether a general topic or subject is a mandatory or permissive subject of bargaining; that is whether the subject falls within the definition of employment relations. Id. Second, there is the issue of the nature of a bargaining proposal, whether "the

particular proposal concerns a mandatory or permissive topic". Id. According to the Board, in order to determine the nature of a particular proposal ERB must "weigh the effect the actual proposal would have on some condition of employment against the effect it would have on some management right". Id. at 5826. If the greater effect is on a condition of employment then the subject matter of the proposal is a condition of employment. Correspondingly, if the greater effect of the proposal is on a management right, the subject matter of the proposal is a management right. Id. Therefore, in the first instance, the proposal would be mandatory because its true nature is a condition of employment. In the second instance, it would be permissive because its true nature is a management right. Id.

In applying this second balancing test in Salem, the Board found that due to its effect, a safety proposal was mandatory even though it addressed the permissive subject of staffing levels. On the other hand, a proposal on the mandatory subject of hours worked was found to be permissive, since it was viewed as impacting management's prerogative to assign duties. Id.

Sound confusing? It is. Sound like the same balancing test as the first or original balancing test? It does. Therein lies the problem. Even though ERB is not supposed to substitute its judgment for that of the legislature's with respect to the subjects specifically

identified as "employment relations" in ORS 243.650(7), one can argue that ERB is doing so through the utilization of its second balancing test. With this background in mind, we turn to the recent scope cases which illustrate this problematic approach.

(c) "Vacation Scheduling": Portland Fire Fighters Association v. City of Portland

In Portland Fire Fighters Association v. City of Portland, ERB UP-143-85, 8 PECBR 8466 (1986)(appeal pending), the ERB faced a scope issue concerning a "vacation scheduling" proposal. The parties to the dispute characterized the question before ERB as whether the number of fire fighters who may be on vacation at any one time is mandatory or permissive? Id. The facts of the Portland Fire Fighters case were as follows.

During 1985 contract negotiations the City and the Union resolved all issues except for certain proposals concerning "vacation leave". Id. at 8467. The predecessor labor agreement had incorporated by reference the City's vacation policy which allowed up to one-sixth (approximately 53 fire fighters) of the City's fire suppression work force to be on vacation at any given time. Id. at 8467-68. In negotiations the Union proposed retaining the existing contract language. The City not only refused to bargain over the proposal, it also notified the Union that it was going to implement a vacation policy which reduced the number of fire fighters who could be on vacation on any given work day.

The City's proposed change limited the number of fire fighters who could be on vacation on any single day to twenty-four (24). Id. at 8468. This meant that in a three calendar day cycle, the number of vacationing fire fighters could be no more than one-tenth of the fire suppression work force. Id. at 8468. At hearing, the Union produced evidence to show, among other things, that the new limit would adversely affect fire fighters' ability to take vacation at preferred times, such as in the summer. Id. at 8471-72. Importantly, the record also reflected that as of January 1, 1986 (the date set for implementation of the new policy) fire fighters would have 3,429 shifts of vacation carried over from years prior to 1985. Id. at 8472. The evidence established that some 9.4 vacation shifts per day would have to be added to the new maximum of 24 shifts/day in order to allow fire fighters to use all of the 3,429 carry-over shifts. Id. at 8472. On the other hand, the employer produced evidence and argument that it had an economic interest in using its fire suppression personnel more efficiently: for example, to reduce its vacation replacement overtime costs. Id. at 8476. With these facts in mind, the Board's analysis of this case is particularly interesting.

In its opinion, ERB initially points out that the subject of "vacations" is a mandatory subject of bargaining under the express language of ORS 243.650(7). Id. at 8472. However, the Board cautions that while a

proposal ostensibly may concern a mandatory subject, in reality it may be a permissive item. Id. at 8472-73. Thus, by utilizing its second "balancing test" to discover the true nature of the proposal, ERB found the fire fighters' proposal to be a staffing proposal, and therefore permissive. Id. at 8473. Distinguishing its precedent which found vacation scheduling to be a mandatory subject of bargaining in the teacher/school district context, the Board noted that a fire department is a completely different kind of enterprise than a school district. Id. at 8474. Also see Eugene Education Assn. v. Eugene School District, 46 Or App 733 (1980). Relying upon its previous case of Int'l Association of Fire Fighters Local 314 v. City of Salem, supra, 12/ the Board noted that unlike most enterprises, a fire department "cannot close for periods of time or safely operate short-handed". Portland Fire Fighters Assn. v. City of Portland, supra, at 8474 citing Int'l Association of Fire Fighters Local 314 v. City of Salem, supra, at 7 PECBR 5827.

Thus, ERB concluded that the City's need to guarantee certain staffing levels outweighed the employes' interest in when vacation can be taken. Id. ERB summarized its holding by stating:

> So long as the system of scheduling vacations established by the City does not unreasonably impinge on the employes' ability to use accrued leave (a situation we do not find to be the case here), a bargaining proposal seeking to establish the scheduling system--that is, one which seeks

> to mandate the number of employes who may be on vacation at one time--affects management's right to staff and assign to a greater extent than it does employment conditions and therefore is permissive. Id. at 8474-75. (emphasis added).

As can be seen from the portion of ERB's opinion underlined above, ERB has now decided to get into the business of deciding when a vacation scheduling proposal "unreasonably impinges" on accrued vacation leave. It can be argued that such an approach results in ERB substituting its judgment for that of the legislature's with respect to what are "employment relations". The legislature already has said that vacations are mandatory subjects of bargaining. Any "impingement" on accrued vacation is too much. On the other hand, staffing decisions generally fall within the realm of management's prerogatives. Oddly enough, the Portland Fire Fighters case is a reversal of the usual problem with respect to identifying the true "nature" of a proposal. Typically a union advances a permissive proposal that is disguised as a mandatory item. In this instance, at first glance, the proposal seems as if it is simply a staffing and assignment proposal; however, in actuality the proposal also adversely affects or "impinges" on fire fighters ability to use accrued vacation time (to the tune of 9.4 shifts per day).

From a labor practitioner's point of view (as opposed to a management representative), ERB's second balancing test raises difficult problems, especially

when applied to the specifically enumerated subjects in ORS 243.650(7). Arguably the Board is "balancing" topics the legislature already designated as mandatory subjects. In addition, the Board may be creating unpredictable guidelines which will cause further litigation. Furthermore, like release time, the Board appears to be changing its early decisions with respect to vacation scheduling. Compare: Portland Fire Fighters Assn. v. City of Portland, supra and Eugene Education Assn. v. Eugene School District, 46 Or App 733 (1980).

(d) Employe Scheduling: Hours v. Assignment of Personnel: The Oregon State Police Cases

Another recent case of considerable importance in the scope area is Oregon State Police Officers Assn. v. State of Oregon Department of State Police, ERB UP-109-85, 9 PECBR 8794 (1986). In the State Police case the Board was presented with several scope of bargaining issues, the most significant of which concerned the subject of scheduling employe work shifts. Before discussing the particulars of this case, it is important to mention the Board's first scope case concerning the Oregon State Police.

In Oregon State Police and Exec. Department v. Oregon State Police Officers Assn., UP-11-85, 8 PECBR 7874 (1985), ERB decided a variety of scope issues. The ruling that is of particular consequence here is the Board's determination that union proposals concerning

the scheduling of employe work shifts, assignments, days off, holidays and vacations by seniority were assignment proposals and therefore permissive subjects of bargaining. Id. at 7900. The Board arrived at this conclusion by using its balancing test to discover the true "nature" of the proposals. With this ruling in mind, we turn to a discussion of the more recent Oregon State Police case.

From sometime in 1980 until June 25, 1985 each police station in the state was allowed to determine its own method of shift selection, based on the station officers' desires, with the approval of the station commander. Id. at 8800. A number of the stations adopted a shift selection method based on seniority. Id. The employer announced its intent to change unilaterally this practice as of June 25, 1985, and as of that date all station commanders would assign shifts to the officers regardless of seniority. Also, prior to June 25, 1985, all officers' days off were rotated forward two days each month. After that date, the State "froze" days off so that the officers had the same days off every week. Id. Finally, prior to June 25, 1985, the State no longer permitted trading shifts or days off. Id. The union filed an unfair labor practice charge, claiming the State violated ORS 243.672(1)(c) by refusing to negotiate over these changes. A majority of the Board (Member Hein dissenting) made the following ruling.

Relying on its prior scope case concerning the Oregon State Police 13/ the Board held that shift selection on the basis of seniority was a permissive subject of bargaining. In so holding, the Board stated:

> Here, as in the Scope Case, we have again "balanced" the employer's interest in shift (duty) assignment against the employes' interest in determining shifts by seniority--the same sort of balancing performed on the holiday/vacation proposals in the Scope Case and on the vacation proposal in IAFF, supra. We do so understanding that some authorities in the private sector declare such subjects to be per se mandatory bargaining topics, i.e. of like character to those statutorily listed as "employment relations". We simply disagree that shift selection, where it is so determinative of duties, falls in the legislatively enunciated category. Id. at 8805.

With respect to changing of the practice of rotating days off, the Board held the State had violated the Act by refusing to bargain over the subject. Id. at 8806. The Board held that the State failed to show any effect on assignment, staffing or any other management prerogative. Id. Accordingly, absent compelling evidence to the contrary, an officer's choice of days off was a mandatory subject of bargaining. Id. at 8806.

Finally, based upon its rationale for the above two results, ERB found that the elimination of the practice of trading days off was a mandatory subject of bargaining as well. However, ERB reached the opposite conclusion with respect to shift trading; that is, the Board found this item to be a permissive subject of bargaining. Id. at 8808.

Once again, Member Hein dissented, this time disagreeing with the portions of the Board's decision which found the scheduling of employes to be a permissive subject of bargaining. Id. at 8810. Member Hein began his dissent by stating:

> In the State Police Scope case I agreed with the conclusion that the determination of which officers would be scheduled to work which shift is a matter of assignment, and therefore is a permissive topic of bargaining. After reconsideration of the issue, I believe that that conclusion simply was wrong. Rather, I now conclude the scheduling of an employe (police officer or not) to any given shift, like the specific hours designated for a shift, is a matter concerning hours of work and therefore, is within the definition of "employment relations". Oregon State Police Officers Association v. State of Oregon Department of State Police, 9 PECBR at 8810.

Member Hein further explained that the Board's erroneous conclusion was based on its failure to distinguish between two kinds of assignments: the assignment of duties during a shift versus assignment of an employe to work a certain shift. Id. Member Hein stated that assignment of duties during the workday is an inherent management prerogative. Id. However, analogizing to precedent in the private sector, Member Hein said that the question of when those assigned duties will be performed concern hours of work, a subject which is mandatory by the express language of ORS 243.650(7). Id. Member Hein went on to conclude that given the particular hours of the day during which an employe must work is a mandatory item, a proposal that addresses

shift scheduling (such as by seniority or rotating shifts) also is a mandatory subject of bargaining. Id. 8811.

Member Hein's dissent offers additional reasoning which is notable. He concludes that the Board's "nature of the proposal" balancing test should not be applied to the proposals presented therein. He states:

> It must be assumed that the Legislature, when it specified "hours" as a mandatory subject of bargaining, realized that agreements concerning hours of work would deprive employers of the right to assign duties at other times. Id. at 8812.
>
> The Legislature, in short, already performed the "balancing test" used by my colleagues in this case. It determined that all public employes--even police officers--have the right to bargain over the subject of working hours, despite the fact that such bargaining naturally would interfere with the ability of employers to assign employes to work during certain hours. Id. at 8817.

Thus, from Member Hein's comments, one can conclude that he believes the Board should not "balance" those subjects listed in ORS 243.650(7) when the effect of a proposal on management's rights is that which is the "necessary and natural" effect (e.g., hours will always have an effect on assignment; rates of pay will always effect the economics of an employer's operation).

No doubt the majority's approach to the scheduling of shifts and Member Hein's dissent have set the stage for further controversy in this area. As Member Hein recognizes, and as discussed infra, the

Board's application of its "nature of the proposal" balance test to the listed items in ORS 243.650(7) raises the question of whether the Board is exceeding its interpretive authority under the PECBA. Moreover, the balancing test now appears to be a weight of the evidence test; that is, if a union can provide sufficient evidence of the effect of a given proposal on employment conditions, a proposal once held permissive may be deemed mandatory. An employer may no longer be able to rely on past decisions regarding a given subject, if in the context of its situation, it cannot prove an adverse effect on management prerogatives. Unfortunately, only further litigation will provide the answer to these questions.

3. Other Recent "Scope" Developments

(a) The Question of Mandatory Versus Permissive In Interest Arbitration--IAFF, Local No. 2752 v. City of Hermiston

The recent case of International Association of Fire Fighters, Local 2752 v. City of Hermiston, ERB UP-51-86, 9 PECBR 8964 (1986) concerns issues of mandatory/permissiveness in the context of an interest arbitration award. In the Local 2752 case, the Union filed an unfair labor practice alleging that the employer refused to abide by an interest arbitration award. Id. The City contended that it was not bound by the award because the Arbitrator ruled on an issue not submitted to him (term of agreement), and on a

permissive issue (restricted use of certain facilities). Id. With respect to the employer's first argument, the Board concluded that the issue of the term of the agreement was submitted to the Arbitrator. Id. at 8968. Second, the Board found that the subject matter of living quarters for fire fighters was a mandatory item. Id. at 8969. As a result, the Board held that the City violated ORS 243.672(1)(f), by refusing to implement the interest arbitration award. 14/

While the result in Local 2752 is straightforward, the question can be raised as to what would have happened had the Board determined the proposal at issue to be permissive. Previously, the Board has upheld an interest arbitration award containing a permissive item. The employer in that case, however, failed to declare the proposal permissive. IAFF Local 696 v. City of Astoria, C-72-84, 8 PECBR 6604 (1984). In all likelihood, if an arbitrator included in his award a permissive proposal that had been properly identified as such by a party, the Board would set aside the entire award and give the prevailing party the option of going back to the bargaining table. See Yoncalla School District v. Lane Unified Bargaining Council, C-113-83, 7 PECBR 5867 (1983); Lankford, Howell L., Fire Fighters and the Scope of Bargaining in Oregon's Public Sector, (Labor Education and Research Center)(1982). As discussed previously, such a result is likely to have a disproportionate effect on labor

organizations, as they are the party most likely to be proposing a permissive item. Thus, once again, parties (especially unions) should take care to resolve scope of bargaining issues prior to factfinding and interest arbitration.

(b) Reclassifications Upward and Downward: Oregon Public Employes Union v. City of Tualatin

The final case to be discussed under the recent developments section of this paper is Oregon Public Employes Union v. City of Tualatin, ERB UP-122-85, 8 PECBR 8214 (1985). It is the only recent scope case which does not concern public safety personnel. The Union filed an unfair labor practice against the City of Tualatin claiming it had refused to bargain in good faith over proposals concerning reclassifications upward and downward, and over a proposal regarding performance evaluation. Id. The Board found the reclassification proposals to be mandatory subjects of bargaining, but found the evaluation proposal to be permissive. Id. at 8219, 8221. With respect to the performance evaluation item, the Board relied on its early precedent dealing with teacher evaluations to find the proposal at issue permissive.

The more interesting aspect of this case concerns the Union's reclassification proposals. The proposals essentially dealt with the rate of pay for duties assigned, and provided for a

grievance/arbitration process for disputes under the reclassification provisions. See OPEU v. City of Tualatin, 8 PECBR at 8217-8219. The City argued that the proposals dealt with assignment of duties, and therefore were permissive. Id. at 8221. The ERB disagreed, however, and found that the proposals concerned rates of pay for duties assigned and grievance procedures--both of which are mandatory subjects of bargaining. Id. at 8221-22. The only item that the Board deemed permissive was a section of the proposals that placed a mandatory and specific time limit on the City for notifying an employe of a downward reclassification. Id. at 8222.

The OPEU case illustrates how a proposal which, at first glance, seems permissive (i.e., involving assignment of duties) may in fact constitute a mandatory subject of bargaining. The Union's proposal in the OPEU case was cleverly drafted so that it was not an attempt to bargain directly over assignment of duties, but over rates of pay for any change in duties, and a process for grieving reclassifications. Because monetary benefits and grievance procedures are specifically identified in ORS 243.650(7), the proposals were mandatory. It is important to note, however, that by bargaining over the rates of pay for reclassifications, the Union gained considerable control over the actual decision to reclassify. Obviously, an employer is less likely to change an employe's duties if

the net effect is to cost more money. The OPEU case again demonstrates how "road blocks" to bargaining can be avoided simply by clever drafting.

C. Summary: Recent Developments

This section of the paper discussed the Board's most recent pronouncements regarding scope of bargaining. While offering some analysis of the Board's rulings, the description and comments were intended to be noncontroversial. We turn now to the section of this paper in which we can "let our hair down" so to speak, and provide both a labor and management perspective of the recent developments in scope of bargaining issues.

IV. SCOPE OF BARGAINING TODAY AND TOMORROW: A MANAGEMENT AND UNION PERSPECTIVE

A. A Management Perspective

From a management labor lawyer's perspective has the importance of the scope of bargaining grown larger or smaller? What is the significance of scope in practical terms? How should a management practitioner treat the concept of scope of bargaining?

At the time the Oregon Public Employe Collective Bargaining Act went into effect in 1973 there were literally hundreds of unanswered scope questions. These included matters that involved substantive issues for those negotiating (e.g., class size, calendar or work schedules) as well as procedural questions (e.g., due process, negotiating ground rules, and timing for

evaluations). Also unanswered was the impact of existing decisions interpreting the National Labor Relations Act by the National Labor Relations Board and the federal courts. In these early years the questions focused on the unique provisions of the Collective Bargaining Act, including the definition of collective bargaining and what issues would fall within that definition.

We now know that with few exceptions ERB has generally paid close attention to the private sector cases from the NLRB and the federal courts as it has wrestled with what items or subjects should be within the definition of collective bargaining and employment relations as set forth in ORS 243.650(4) and (7). Certainly the issue of scope is still alive. The ERB continues to receive unfair labor practice complaints and decides issues which focus on whether or not a matter is mandatory or permissive.

Recent cases filed with the ERB involving scope have to some measure grown out of the ongoing bargaining relationship between the parties. Oregon AFSCME, Council 75 v. Clackamas County, UP-80-86. Refinement on the approach to handling these cases is still underway by the ERB and it is easy to debate the merits of the balancing test that has been used by the ERB. However, from this practitioner's view, absent some dramatic change in policy by the ERB regarding the definition of employment relations in ORS 243.650(7) or

a chanage in either that definition or the definition of collective bargaining by the legislature, most of the questions on scope have either been answered or have been clarified to a point where an educated guess on probable outcome before the ERB is possible. Thus, mid-term scope-related cases are likely to cause both labor and management practitioners problems in the future. However, scope in the context of developing a proposal for use at the negotiation table and the kinds of issues that grow out of the bargaining process involving scope is much more predictable and workable.

In representing the employer clients of our management-oriented specialty law firm, I have taken the approach since the passage of the Oregon Public Employe Collective Bargaining Act that with respect to talking about subjects at the bargaining table it makes little or no difference if the issue is mandatory or permissive. Essentially, bargaining means that the labor organization can present its proposal and management can do likewise. In this context the realities of the give and take of the bargaining process and the relative strengths and weaknesses of the parties determines which subjects, permissive or mandatory, will ultimately end up in the contract agreed upon by the parties.

As to permissive subjects being raised at the bargaining table, the moving party on such an issue is the one "at risk" and ultimately must make a decision as

to whether to pursue that subject when facing a strike or to consider making it part of an implemented bargaining proposal. Until that decision is made, the only duty on either party is to bargain in good faith. With relatively few words of explanation, either side in the process can say "no" to a proposal of the other. Perhaps the only item lost to the parties in considering a permissive subject is the time spent in covering the point. Unfortunately in the public sector discussing, reviewing or bargaining about a permissive subject can involve considerable time.

This approach to the permissive subjects has worked in the private sector. With few exceptions it has thus far worked in the Oregon public sector. There is no reason to believe that it will not continue to work as the issues concerning scope are further refined by the ERB.

In taking the approach of discussing or bargaining about permissive subjects, it must always be kept in mind that if the proposal is so unacceptable or is perceived as one that must remain within the scope of management's rights then that fact should be communicated to the other side as early as possible. It takes little effort to place the other side on notice. That party can then alter the questioned proposal, remove it from the table, in some way try to make it mandatory, or submit the issue to the ERB for resolution.

Given the fallback ability to say "no," this process generally seems to work, particularly with unions originally from the private sector who are involved with representing public sector employes. Until recently it generally worked with public sector unions. Initially it did not work with respect to some public sector unions whose representatives seemed hellbent on throwing everything into the collective bargaining process. From my personal experience this included everything from the issues considered by the ERB to a few other unique subjects such as the location where members of a faculty could be buried on a college campus or the number of fish or the type of charcoal that could be used in the aquarium of the biology class. Unfortunately, with the absence of ground rules from ERB and court decisions, representatives from both labor organizations and management often engaged in game-playing which caused the focus on the critical issues of bargaining to be blurred. Instead, more time seemed to be spent on getting up to and over the hurdles of the bargaining process than was spent on constructive collective bargaining designed to arrive at a contract. Stated another way, the weight caused by the scope of bargaining questions prevented the parties from arriving at the finish line of a collective bargaining agreement in a timely or credible fashion.

Why did some groups in the public sector make so much of permissive subjects? The answer to the

question varies. It can be tied to political pressures, business need, perceived member or employer needs, lack of leadership or a lack of understanding about the bargaining process. In some settings it became apparent that a permissive subject was often used as a convenient prop on the stage of factfinding, or as a cover at some other point in the bargaining process. Making an issue about a permissive subject was also useful for public relations and to allow the party insisting on the issue to show how cantankerous, unyielding and unfair the other side was. Of course, throughout this process the public knew or cared little about the meaning of labels such as permissive and mandatory.

Fortunately, the ERB put a damper on the overzealous use of and insistence on permissive subjects not worthy or appropriate for the bargaining process. In their wisdom the ERB has come up with a number of general rules to limit the game playing. Perhaps the most important of those rules was a pronouncement by ERB that it is an unfair labor practice to submit and carry a declared permissive subject of bargaining through the factfinding process. Redmond Education Assn. v. Redmond School District, C-164-77, 3 PECBR 1611 (1977). In addition, if a nonmandatory subject is submitted, it must ultimately be withdrawn. Oregon AFSCME, Council 75 v. Clackamas County, UP-80-86 (1986).

With respect to this latter point the ERB has indicated that when an exclusive representative pursues a nonmandatory subject to factfinding, the violation need not be cured by requiring the union to return to factfinding prior to the engaging in a strike, assuming the union disavows further pursuit of the subject of the proposal. Redmond Education Assn. v. Redmond School District, C-164-77, 3 PECBR 1611 (1977). When both parties submit nonmandatory subjects to factfinding, the ERB has ordered a cease and desist remedy. Springfield Education Assn. v. Springfield School District, C-144-83/C-161-83, 7 PECBR 6357 (1984).

In Oregon AFSCME, Council 75 v. Clackamas County, the ERB also stated that when an employer or a union pursues a nonmandatory subject to factfinding, the Employment Relations Board will order the employer or union to withdraw those proposals from negotiations. In addition, the ERB also has declared in Clackamas County that the "cooling off" period following factfinding will not commence until such proposals are removed. Even more striking, the ERB, armed with the belief that its precedents are "clear," has ruled that the knowing pursuit of a nonmandatory subject into factfinding may well constitute conduct warranting imposition of a civil penalty under Board Rule 115-35-075.

A quick review of recent ERB scope cases indicates that the number of issues dealing with subjects alleged to be permissive have decreased. However, a

reading of these same cases shows that when scope is raised the process becomes more sophisticated and complex. Labor is finding ways to integrate a mandatory "cover" on their otherwise underlying permissive subjects. Management is endeavoring to separate permissive items from mandatory language. Both are doing their best to make good arguments to meet the ERB's balancing tests. In terms of posturing during the process, instead of parading across the stage of factfinding with a permissive subject, the party interested in the subject simply removes it from the factfinding stage and waits until the post-factfinding bargaining to bring it up again.

Once in the cooling-off period after factfinding, the rules on forcing an issue on a permissive subject generally remain the same. Making a permissive subject a strike issue can taint that ensuing strike and result in a finding that the labor organization has committed an unfair labor practice. This, in turn, can jeopardize the status of employes who go on strike, can harm the credibility of the labor organization and possibly be cause to sue the union for damages.

If it is the employer who has forced the issue of a permissive subject to the last round of bargaining, further insistence or implementing of a permissive subject can subject the employer to an unfair labor practice. The employer's action can also impact the

method and manner in which the strike replacements can be hired or continue employment; if, ultimately, it is appropriately challenged by the labor organization.

As noted, the parties to the collective bargaining process in Oregon's public sector have become more creative in attempting to identify or bull's-eye mandatory versus permissive subjects. The truly difficult task comes when a party must make the judgment call as to whether to insist on the item as part of a final proposal and thereby face the potential liability for a wrong guess, particularly when the legal status of the issue is not likely to be quickly decided.

What remains for the ERB to decide in the realm of scope of bargaining? Certainly issues involving scope will continue to be presented to the ERB from time to time. Mid-term questions concerning unilateral actions by an employer on a claimed permissive subject will continue to create a long line of ERB cases. The second area of challenge will continue to come out of the factfinding or strike stage of bargaining. Throughout this parade of cases the ERB will continue to refine and perhaps confuse us with its balancing test.

The Oregon Public Employes Collective Bargaining Act has come a long way since 1973. With the help of the Oregon Court of Appeals, the ERB has shaped the fundamental guidelines on scope of bargaining and an equally workable body of law that tells us how to implement or use those guidelines. Although further

refinements are forthcoming, it is this practitioner's hope that it is the ERB which will effect the evolution process in a logical and sound basis. In my view it is unnecessary and would be very wrong to override or change the scope of bargaining through a legislative change in the statute.

B. A Union Perspective

1. Employers and Unions Should Bargain Permissive Items and, When Necessary, "Just Say No"

I agree with my colleague that it should make little difference at the bargaining table if the subject is a mandatory or permissive item. To coin a popular phrase a party can always "just say no" to a bargaining proposal. No harm is done by negotiating permissive items as long as such proposals are declared permissive in a timely manner by the receiving party. Furthermore, by bargaining permissive items, parties potentially have much to gain. They avoid, at least temporarily and perhaps altogether, expensive litigation. Also, as mentioned previously in this paper, bargaining permissive proposals may result in a "total package" which is more acceptable to the parties than one which consists of all mandatory items. Bargaining more subjects provides more options and allows creativity. It should be noted that public safety employers and employes are not excluded from the benefits of the "just say no" approach just because, absent a negotiated agreement, they face interest arbitration. There is no

"good reason" why such parties cannot bargain permissive items at the table. Again, the important protective step for any party to take is to declare the proposal(s) permissive in a timely manner. In sum, parties in the public sector should follow the wisdom of those who traveled this path before us in the private sector. Instead of responding to the urge to flex bargaining muscle by refusing to bargain over permissive items--"just say no".

I depart company from my colleague with respect to his view of the early scope litigation. The "just say no" approach may not have initially worked, but that is understandable. At the time, it was incumbent upon public sector unions to test the limits of the bargaining obligation. It was natural and proper that they do so. Furthermore, it is not as if public employers were willing to use the "just say no" approach. They, too, tested the limits of the bargaining obligation, played "hard ball" so to speak, often declaring proposals permissive which clearly were mandatory. These early strategies caused the evolution of the scope of bargaining obligation. If limits had not been tested, scope of bargaining would not be where it is today.

2. The Board Has Gone "Off Course" With Respect to Release Time and Vacation/Employe Scheduling

There is no doubt that the present Board has demonstrated sound judgment and sophistication in its

decisions in the scope of bargaining area. However, unlike my colleague, as a union practitioner I am not content with some of the Board's recent rulings.

The ERB's reasoning and decision concerning release time for union activities in the City of Portland case is disturbing to say the least. The Board's decision is a direct departure not only from its own precedent but private sector precedent as well. (See: e.g., Bethel Education Association v. Lane County School District No. 52, Case No. C-163, 1 PECBR 77, 78 (1984) and citations therein). The ERB majority provided little justification for such a departure. In fact, the Board expressly admitted that its "purpose" and "probable effects" analysis had served adequately in the past. City of Portland, supra at 8 PECBR 8123. Thus, why the Board majority chose to change the rules in the middle of the game is a mystery. If the "purpose" and "probable effects" analysis has worked for years in both the public and private sector, there is no need (as dissenting Member Hein points out) for the Board to embark upon an arbitrary, line-drawing approach. Since the scope area already is filled with subjectivity, adding another analysis which offers little objective guidance for practitioners only compounds existing uncertainties.

Perhaps more disturbing than the release time issue are the Board's recent pronouncements on the subjects of vacation scheduling and employe scheduling.

Once again, the ERB has departed from well-established private sector precedent by concluding that proposals concerning these subjects are permissive (e.g., see Member Hein's dissent, 9 PECBR at 8810-11, Oregon State Police Officers Assn. v. State of Oregon Department of State Police, supra.) In this regard, also troubling is the Board's adoption and application of its "nature of the proposal" balancing test to the specifically enumerated subjects of ORS 243.650(7). Certainly the ERB has a legitimate need to determine the true nature of a bargaining proposal. Parties sometimes do advance proposals which are not what they purport to be. However, and as discussed supra, a second balancing test does nothing more than further complicate and subjectivize an approach which already lacks objectivity. Why not a "true purpose" test? As Justice Stewart said of obscenity, the Board Members, with their labor expertise, will know a "disguised" proposal when they see it. There is no need to perform a balancing test. More importantly from this practitioner's point of view, by applying a balancing test to the subjects identified in ORS 243.650(7), the ERB is substituting its judgment for that of the legislature's; and thus it exceeds its interpretive authority under the PECBA.

3. Scope of Bargaining in the Future

(a) For Practitioners

Despite the above troubling cases, undoubtedly "scope" issues will continue to decline in importance except for the few areas which remain unsettled (for instance, as my colleague points out, employer unilateral changes during the term of a contract). Parties will adapt to the ERB's rulings as they have done in the past. Through their creativity, employers and unions will adopt appropriate bargaining strategies, or change the law by legislative amendment or by convincing ERB it has erred. There is nothing wrong with any of these approaches. Even public safety employers and their represented personnel can be expected to develop strategies which deintensify their particular problem relating to permissive items in interest arbitration.

(b) For the Board

As a general matter, in the area of public safety the Board should focus on not only the peculiar characteristics and concerns of public safety employers when addressing scope questions, but also the unique concerns of their personnel. There are instances when rote application of the scope rulings in the teacher cases are not appropriate because public safety employes have their own distinct working conditions. For example, take the subject of involuntary transfer as applied to state police officers. The ERB has ruled,

generally, in the teacher-school district context, that substantive proposals regarding involuntary transfer are permissive. (See e.g., Gresham Grade Teachers Assn. v. Gresham Grade School District, C-61-78, 5 PECBR 2771 (1980)). The Board appears to be extending the same ruling to state police officers. See Executive Department, Labor Relations Division, and Oregon State Police v. Oregon State Police Officers' Association, UP-11-85, 8 PECBR 7874, 7898-7901 (1985). However, it does not necessarily make sense to do so. A teacher's transfer from one school to another within a city is entirely different from a state trooper's transfer from Portland to Klamath Falls. The employe impacts in the latter situation are tremendous (the uprooting of families, the selling of homes and so forth). The Board should apply its balancing analysis to reflect these different employe impacts.

Also from a union's perspective, the Board does need to make some changes in its recent rulings. With respect to release time for union business, the ERB should continue to follow its own earlier precedent and private sector precedent which employs the "purpose" and "probable effects" test. No persuasive reason exists for departing from such precedent. Second, ERB similarly should follow its prior precedent and private sector cases which conclude that vacation/employe scheduling are mandatory subjects of bargaining. In this context, the Board should not utilize a second

balancing test for determining the true nature of a proposal. Instead, it should devise a different approach, such as a "true purpose" analysis, which does not result in the Board arguably substituting its judgment for that of the legislature's.

While the law with respect to scope of bargaining is working, there is always room for improvement.

END NOTES

1. The Board is the body to which the legislature delegated the authority to administer and enforce the PECBA. See ORS 243.766

2. Section 8(d) of the LMRA provides in relevant part:

> . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . .

As set forth previously, the Oregon PECBA requires employers and unions to bargain over "employment relations". ORS 243.656(5). ORS 243.650(7) defines employment relations as follows:

> "'Employment relations' includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment."

3. See NLRB v. Borg-Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958).

4. ORS 342.850.

5. The just cause proposal provided in relevant part:

> No professional employee shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause. (emphasis added) Eugene Education Assn. v. Eugene School District No. 4J, 1 PECBR 446, 448 (1975)

6. In addition to student contact time, the Board decided that daily teaching loads and teacher preparation time are mandatory subjects of bargaining. Id. at 361, 362.

7. The "summer vacation" proposals presented by the union were as follows.

> First proposal:
> 10.2 Work Year: . . . .
> 10.2.3 Unpaid vacations shall be as follows:

"a. Summer vacation shall end on August 29, 1978 . . . ."
"b. Summer vacation shall begin on June 7, 1979."

Second proposal:

10.2.3 Unpaid vacations shall be as follows:
"d. Summer vacation shall be at least sixty (60) days exclusive of Saturdays, Sundays and holidays."

Third proposal:

10.2.3 Unpaid vacations shall be as follows:
"d. Summer vacation shall be at least twelve (12) continuous weeks."

The Court of Appeals held that the second and third proposals were mandatory subjects of bargaining. Eugene Education Assn. v. Eugene School District, et al., 46 Or App at 740.

8. A court's review is limited in scope of bargaining cases to (1) whether ERB correctly interpreted the law, and (2) whether the decision by ERB is supported by substantial evidence. See: Springfield Education Assn. v. Springfield School District, 290 Or 217, 621 P2d 547 (1980); Int'l Assoc. of Fire Fighters v. City of Salem, 68 Or App 793 (1984).

9. ORS 243.736(1) provides:

> It shall be unlawful for any emergency telephone worker, police officer, fire fighter or guard at a correctional institution or mental hospital to strike or recognize a picket line of a labor organization while in the performance of official duties.

10. ORS 243.672(1)(b) makes it an unfair labor practice for a public employer to "dominate, interfere with or assist in the formation, existence or administration of any employe organization."

11. The City of Portland case came to ERB on a petition for declaratory ruling. Therefore, under the Board's rules, its decision was based solely upon the facts alleged by the Petitioner, City of Portland. Consequently, the accuracy of the factual allegations were not at issue in the proceeding. City of Portland, ERB DR-4-85, 8 PECBR at 8121. See fn. 1.

12. The Salem case also involved, among other things, a "vacation scheduling" issue. The Salem case was affirmed on appeal; however, neither party appealed ERB's decision regarding the vacation

proposal at issue therein. See Int'l Association of Fire Fighters v. City of Salem, 68 Or App 793 (1984).

13. Executive Department, Labor Relations Division, and Oregon State Police v. Oregon State Police Officers Association, Case No. UP-11-85; 8 PECBR 7874 (1985).

14. The Board concluded that the employer did not commit a (1)(e) (refusal to bargain) violation under the Act because there is no further duty to negotiate once arbitration is ordered under the PECBA. IAFF Local No. 2752 v. City of Hermiston, supra, at 8969.

SCOPE OF BARGAINING TABLE OF SUBJECTS*

Mandatory Subjects

Academic/Personal Freedom:	Proposals entitled teacher to full rights of citizenship and that lawful religious or political activities shall not establish grounds for discipline. Springfield Ed. Assn. v. Springfield Sch. Dist. No. 19, 1 PECBR 347, 364 (1975).
	Teacher's right to use controversial material and to express personal opinions without guidelines. Springfield, 1 PECBR at 364.
	Personal life of an employee is not an appropriate concern of school board. Proposal is mandatory providing it does not require bargaining over qualifications set forth in statutes or regulations for hiring and retention. Springfield, 1 PECBR at 363.
Assignment:	Proposal requiring that teachers be notified of their assignments for the next year. South Lane Ed. Assn. v. South Lane Sch. Dist. No. 45J, 1 PECBR 459, 463 (1975)
	Extra duty assignment compensation. Eugene Ed. Assn., 1 PECBR 446, 451.

*Our thanks and appreciation go to Nancy J. Hungerford for allowing us to use portions of the chart of mandatory and permissive items contained in Hungerford & Bischof, Oregon Labor Law Today (1982).

Association Rights:	Requiring the district to provide reasonable paid release time for employees serving on the union's negotiating team or attending grievance sessions. Eugene Ed. Assn. v. Eugene Sch. Dist. No. 4J and Richard Miller, 5 PECBR 3004, 3008, and OSEA v. Sch. Dist. No. 9 of Jackson County, 4 PECBR 2352, 2353 (1979).
	Requiring the district to provide 30 days release time for association representatives to participate in negotiations and grievances. Eugene, 5 PECBR at 3008.
	Proposal allowing an employee unpaid leave to serve as an officer or employee of the local association and to receive experience credit for the leave. Eugene, 5 PECBR at 3009, and Springfield, 1 PECBR at 355.
	Union-school communications including use of bulletin boards, intraschool mail and mailboxes, announcements by the union, access to district's financial information, use of school equipment at a reasonable cost for supplies and the right to speak at faculty meetings. Springfield, 1 PECBR 355.
	Proposals that all written district communications be posted in the staff room of each school. Eugene, 1 PECBR at 455.
	Proposal to allow employees on the union's executive committee up to 16 hours per month for union activities

during working hours. Executive Dept. and Oregon State Police v. Oregon State Police Officers Assn., 8 PECBR 7874, 7888 (1985).

Proposal allowing up to five bargaining unit members on the union negotiating team to attend bargaining sessions during duty hours. Oregon State Police, 8 PECBR 7874, 7888.

Benefits:

Requiring that insurance benefits be maintained at or better than the current levels. Oregon State Police, 8 PECBR 7874, 7906. (Generally, proposals which concern the level of benefits to be offered employees are mandatory.)

Compensation:

Any certificated employee employed more than 96 hours during the year shall advance in the salary schedule. Eugene Ed. Assn. v. Eugene Sch. Dist 4J, 1 PECBR 446, 455 (1975).

Extra pay for extra duty proposals. Springfield, 1 PECBR at 364.

CPI increases. Gervais, 5 PECBR at 4209.

Special trip and meal rates and compensation. Gervais, 4 PECBR at 4222.

Additional pay for teachers who voluntarily transport students to activities. Springfield, 1 PECBR at 366.

Proposals requiring overtime pay or comp. time in lieu of overtime. Oregon State Police, 8 PECBR 7874, 7894.

Compensation for time spent in training. OSEA v. Gervais Sch. Dist., 5 PECBR at 4222.

Proposals for incentive pay based on continuing education and training. Oregon State Police, 8 PECBR 7874, 7905.

Proposals concerning tuition reimbursement. Oregon State Police, 8 PECBR at 2895.

Incentive pay plan based on obtaining and maintaining BPST certification. Oregon State Police, 8 PECBR at 7905.

Contract Mechanics:

Maintenance of standards. Springfield, 1 PECBR at 357, Eugene Sch. Dist. No. 4J v. Eugene Ed. Assn., 4 PECBR 2403, 2407 (1979).

Zipper clause. Eugene, 4 PECBR at 2407.

Separability clause. Eugene, 4 PECBR at 2408.

Management rights clause. Eugene, 4 PECBR at 2407.

Funding clause. Eugene, 4 PECBR at 2409.

Proposal that employer will print and distribute copies of the collective bargaining agreement. Springfield, 1 PECBR at 350.

Discipline (Employee and Student):

Proposals eliminating contract references to the county civil service system. AFSCME, Council 75 v. Clackamas County, 7 PECBR 5839, 5843 (1983), aff'd 69 Or App 488 (1984). (This is

a mandatory proposal because if there is a conflict between the county civil service system and the PECBA, the PECBA prevails.)

Just cause proposals requiring that a negative employment sanction be reasonably related to the offense upon which it is based. Gresham Grade Sch. Teachers Assn. v. Gresham Grade Sch. Dist. No. 4 and Fred Larson, 5 PECBR 2771, 2781 (1980), aff'd in relevant part, 52 Or App 881 (1981).

Just cause language that precludes discipline, reprimand, reduction in rank or compensation, suspension, demotion, nonrenewal, dismissal and termination without just cause and making any such action subject to the grievance procedure. Eugene, 1 PECBR 446, 448 and Gresham, 5 PECBR at 2779-80.

Definition of due process to include minimum fairness procedures. Gresham, 5 PECBR at 2779.

Proposal requiring criticism of teachers to be made in private. Springfield, 1 PECBR at 353.

Proposal requiring that before disciplinary action is taken there must be a teacher administrative conference and a written explanation. Gresham, 5 PECBR at 2779.

Proposal requiring suspension with pay prior to final school board action. Gresham, 5 PECBR at 2783.

Proposals requiring that teachers receive written notice of disciplinary procedures, proposals establishing the procedures by which teachers may register their objections to discipline decisions made by administrators, and proposals which allow teachers to temporarily remove a student from the classroom in order to protect the teacher's physical safety. Lincoln County Ed. Assn. v. Lincoln County School Dist., 4 PECBR 2519 (1979).

Evaluations:

Proposal requiring that the criteria for teacher evaluations be clearly defined. Springfield, 290 Or 217, 240 (1980).

Minimum fairness procedures in evaluations, insuring notice of and opportunity to respond to evaluation reports, right to have evaluations reduced to writing, right to attach objections to the evaluation and an opportunity to request an evaluation. Springfield Ed. Assn. v. Springfield Sch. Dist. No. 19, 3 PECBR 1950, 1958 (1978).

Proposals requiring written criteria for evaluation to include performance goals, the opportunity to request another evaluation if the supervisor recommends the dismissal or renewal and notice of documents to be inserted in personnel file within four weeks of their preparation. East County Bargaining Council v. Centennial Sch. Dist., 6 PECBR 5556 (1982), aff'd 69 Or App 47 (1984), partially vacated and remanded 298 Or 146 (1984).

Proposals to incorporate the evaluation mechanics required by ORS 342.850. East County Bargaining Council v. Centennial Sch. Dist., 8 PECBR 6776 (1985), on partial remand 298 Or 146 (1984). (A key in this decision appears to have been the fact that the statute had no enforcement mechanism of its own.)

A proposal that troopers would not be subject to an Individual Activity Record unless the criteria for the record was given to the troopers. Oregon State Police, 8 PECBR at 7912 (1985).

Facilities and Equipment: Proposals requiring provision of teacher lunchroom, restroom, lounge, telephone, parking facilities, duplicating facilities, office furniture, daily teaching supplies, chalkboards and appropriate teaching apparel for specialized subjects. Springfield, 1 PECBR at 359-360.

Proposal requiring the district to provide a teacher reference library and include texts requested by teachers. Springfield, 1 PECBR at 359.

Proposal requiring faculty room large enough to hold two-thirds of the staff and specifying the furnishings. Eugene, 1 PECBR at 458.

Requirement that the district allocate $50 per year per classroom teacher to purchase items the teacher deems necessary and requiring the establishment of a cash fund from which to

reimburse teachers for out-of-pocket expenses. Eugene, 1 PECBR at 455, 458.

Provision requiring the maintenance of all classrooms in the district in the manner equal to the newest in the district. Eugene, 1 PECBR at 458.

Proposal that teachers not be held responsible for student charges or damages of any school supplies and equipment. South Lane, 1 PECBR at 466.

A proposal which requires the parties to confer concerning various teaching materials and equipment. Springfield, 1 PECBR at 358-359.

Providing a ready room for bus drivers. Gervais, 5 PECBR at 4222.

Proposal providing that the district provide adequate facilities for sleeping, eating and relaxation for firefighters, and prohibiting the use of firefighters' facilities for public meetings. International Assn. of Firefighters, Local 2752 v. City of Hermiston, 9 PECBR 8964, 8969 (1986).

Grievances/Arbitrations:

Proposal to subject the question of just cause for teacher discipline, reprimand, reduction in rank or compensation, suspension, demotion, nonrenewal, dismissal or termination to the grievance procedure. Gresham, 5 PECBR at 2783.

Providing employees with an opportunity to present their

concerns over district policies or decisionmaking. Gresham, 5 PECBR at 2784.

Hiring:

Language prohibiting any restrictions against the hiring of related teachers. Eugene, 1 PECBR at 455. (Except to the extent that ORS 342.515 may prohibit hiring a teacher related to a member of the school board.)

Contracting out services performed by bargaining unit members. Gervais, 5 PECBR at 4222.

Proposal which would prohibit the district from selecting teachers on the basis of their ability to handle extra duty assignments. Eugene, 1 PECBR at 451.

Layoff/Reduction in Force:

Proposals providing for severance pay in the event of a reduction in force. Eugene Ed. Assn. v. Eugene Sch. Dist. 4J, 6 PECBR 4849 (1981).

Proposals determining the order in which employees are to be laid off and recalled, as long as the layoff scheme does not require the district to assign an employee to a position for which he is not qualified. Eugene, 5 PECBR at 4856 (1981).

A proposal referencing the requirements of ORS 342.934, the statutory procedure for reduction in staff. Springfield Ed. Assn. v. Springfield School Dist. No. 19, 7 PECBR 6357 at 6395 (1984).

Proposals requiring that the order of layoff be based on

seniority and include bumping provisions. International Assn. of Firefighters, Local 314 v. City of Salem, 7 PECBR 5819, 5827 (1983). (The ERB held that the bumping provision of the proposal did not affect staffing, as the lowest classification to which an employee could bump was that of firefighter and all employees were qualified to be firefighters. Accordingly, there was no possibility that an employee would bump into a classification for which he was not qualified.)

Personnel Files:

Proposal requiring availability of personnel files to employees for inspection. Springfield, 3 PECBR at 1962. Proposal requiring district to provide copies of personnel file to employee free upon request. Gresham, 5 PECBR at 2782.

Proposal that an employee's representative can inspect an employee's personnel file only with the employee's permission. ONA v. Eastern Oregon Psychiatric Center, 9 PECBR _____ (1986.)

Professional Development/ Training:

Proposal providing for cooperative in-service workshops and conferences for professional development and educational improvement. South Lane, 1 PECBR at 471.

Proposal requiring notice to an educational developmental council concerning the outcome and reasons for decisions on proposals for experimental programs. South Lane, 1 PECBR at 464.

Language on professional development and educational improvement, including the establishment of a professional development committee and sponsoring of workshops, within the school day if attendance is required. Eugene, 1 PECBR at 457.

Proposal to establish a council on professional conditions which would determine the council's duties, meeting times and membership, providing the council's authority is limited to recommendations on conditions of employment. Springfield, 1 PECBR at 365.

Safety:

Proposals requiring the employer to maintain existing safety requirements. International Assn. of Firefighters, Local 314 v. City of Salem, 7 PECBR 5819, 5828 (1983).

A proposal providing that all service, engine and truck companies have a minimum of three personnel. IAFF v. City of Salem, 7 PECBR at 5828. (The Board determined that the proposal had more of an effect on safety than manning as it only required the city to maintain its existing practice of assigning three firefighters to a company.)

Proposal requiring compliance with all applicable statutes, rules and regulations related to safety. Oregon State Police, 8 PECBR at 7897.

Proposal requiring the state to provide hazard pay if less than two officers

assigned to patrol cars between 10:00 p.m. and 6:00 a.m. Oregon State Police, 8 PECBR at 7910.

Transfers and Vacancies:

Proposal which would permit teacher requests for transfer and would require employer response within specified time. Springfield, 1 PECBR at 351.

Proposal that a teacher subject to an involuntary transfer would have the opportunity to make his preference known concerning a new assignment and that notice of the involuntary transfer would be provided as soon as possible. Springfield, 1 PECBR at 351.

Proposal requiring teachers to be informed of appropriate vacancies at the time the involuntary transfer is made and allowing the teacher to visit the new assignment, if possible. Springfield, 1 PECBR at 352.

Proposal specifying procedural requirements relating to requests for transfers, that transfer will be made by written notice by the director of personnel after consultation with the principals and requiring attention to the "general welfare" of the district and the individual desires of teachers. Eugene, 1 PECBR at 453.

Proposal that to be considered for transfer, the employee must be qualified as reasonably determined by the employer. Oregon State Police, 8 PECBR at 7916.

Working Conditions:

Amount of preparation time each day or week. Springfield, 1 PECBR at 362; Gresham, 5 PECBR at 2894.

Proposals specifying the number of hours of people contact time per day. Springfield, 1 PECBR at 361 and Gresham, 5 PECBR at 2894 (1980).

Proposal that additional preparation time be granted in lieu of premium pay whenever class size exceeds standards set by district. Yoncalla Sch. Dist. v. Lane Unified Bargaining Council, 7 PECBR 5786 (1983), reconsidered 7 PECBR 5895 (1983).

Proposal requiring one additional period for planning for all head teachers. Eugene, 1 PECBR at 458.

Proposal providing athletic director an additional period of release time per day. Eugene, 1 PECBR at 458.

A proposal that teachers be granted preparation days prior to parent conference days. Springfield Ed. Assn., 7 PECBR at 6393.

Proposal allowing police officers to choose days off and trade days off. Oregon State Police Officers Assn. v. State of Oregon Dept. of State Police, 9 PECBR 8794 at 8806, 8808 (1986).

Proposal allowing employees to seek an upward reclassification through a grievance mechanism, setting the rate of pay for the reclassification and leaving the employee to appeal denial of

the reclassification through arbitration. OPEU v. City of Tualatin, 8 PECBR 8214, 8221.

Proposal allowing employees to grieve reclassification downward and setting rate of pay. OPEU v. City of Tualatin, 8 PECBR at 8221 (1985).

Proposal that preparation time precede parent conference days. Springfield Education Assn. v. Springfield Sch. Dist., 7 PECBR 6357, 6364 (1984).

Proposal that an employee will not be disciplined for engaging in outside employment so long as the employment does not conflict with the interests of the employer, does not detract from the efficiency of the employee and does not result in a discredit to the employer. Oregon State Police, 8 PECBR at 7897.

Work Schedules and Hours: Language providing for credit towards community service/education training hours required for participation in the incentive program by working overtime for free and receiving compensation time off or working overtime for straight time. Oregon State Police, 8 PECBR at 7894.

Proposal that meal periods or rest periods will be interrupted only for emergencies necessitating the attendance of the employee. Oregon State Police, 8 PECBR at 7891.

Work Year:	The number of workdays in the work year. Springfield, 1 PECBR at 362.
	Proposal defining workdays and providing for the amount of compensation that must be paid if less or more than 190 days are worked. East Council Bargaining Proposal, 6 PECBR 5556, 5568.
Vacations:	The length of summer vacation. Eugene Ed. Assn. v. Eugene Sch. Dist, 46 Or App 733 (1980).
	Proposals concerning the length of Thanksgiving, Christmas and spring vacations. East County Bargaining Council, 6 PECBR 5556, 5569.

Assignment:

Proposals which restrict the duties assigned to a teacher and provide that such duties may not be substantially altered or increased without negotiations. Springfield, 1 PECBR at 357.

Assignment of subject matter and number of preparations per day. Springfield, 1 PECBR at 361-62.

Language requiring notice of next year's assignments by a specific date. South Lane, 1 PECBR at 463.

Language prohibiting the district from assigning to any one teacher more than one new course without providing a summer workshop. Eugene, 1 PECBR at 451.

Proposal that teachers not be required to drive students to activities. Springfield, 1 PECBR at 366.

Proposals which would prohibit the district from assigning teachers to non-professional duties, such as lunchroom, playground or bus loading supervision, collecting money from students and clerical functions. Springfield, 1 PECBR at 365.

Proposal requiring that job sharing be available for any assignment, providing the teachers involved have agreed to work together. Springfield Ed. Assn., 7 PECBR 6357, 6395.

Proposals stating that employees will not be required to perform non-police work. Oregon State

	Police, 8 PECBR 7874, 7912. (A revised proposal providing for 5% additional pay when employees are required to perform non-police work is mandatory.)
	Proposal requiring the employer to assign administrative duties (limited duty assignment) to officers who are recuperating from injuries. Oregon State Police, 8 PECBR 7874, 7914.
Association Rights:	Proposals committing the school board to furnish any information the association believes necessary and placing association items first on all school board meeting agendas. South Lane, 1 PECBR at 473-74.
	Proposal that the association shall have the right to call faculty meetings during building hours providing that such meetings will not take precedence over regularly assigned duties. Springfield Ed. Assn., 7 PECBR at 6388. (Even without the "proviso," the proposal is permissive.)
	Proposal prohibiting nonpromotional transfers of employees who are association representatives unless the employee consents or the operational needs of the employer mandate the transfer. Oregon State Police, 8 PECBR 7874, 7888.
Benefits:	Choice of insurance carrier. Salem Police Employees Union v. City of Salem, 8 PECBR 6642, 6650 (1984).
Compensation:	Proposals on extra pay for those not in the bargaining

unit, such as administrators, classified employees or substitutes. Springfield, 1 PECBR at 364. (An employer cannot be required to bargain over conditions of employment for employees who are not in the recognized unit.)

Contact Mechanics:

Proposals broadening the scope of the recognition clause. Oregon Nurses Assn. v. Oregon Health Sciences Univ., State of Oregon, 7 PECBR 6072, 6074 (1983).

Discipline (Employee and Student:

Just cause language precluding transfer or deprivation of any professional advantage. Gresham, 5 PECBR at 2779-80.

Definition of just cause which would allow an arbitrator to substitute his judgment for that of the district. Gresham, 4 PECBR at 2780.

Proposal that would require both an evaluation and a complete review of the personnel file prior to instituting any discipline. Gresham, 5 PECBR 2782.

Student discipline language, including the right to develop and adopt student discipline procedures and policies; the right to assign decisions and authority to discipline, the right to assign and place students, the right to make final and binding decisions on disciplinary matters and a proposal which provides that the student shall be the responsibility of the administrator during the appeal process. Lincoln

County Ed. Assn v. Lincoln County School Dist., 4 PECBR 2519 (1979).

Evaluation:

Proposals which define the basis for the evaluation, including criteria for standards by which performance is evaluated, areas to be evaluated and the use of evaluations. Springfield, 3 PECBR at 1957.

Proposals defining mechanics of teacher evaluation, including the form and format to be used, the content of the evaluation report, the number of evaluations and timing, sequencing and length of observations, recommendations for improvement and deficiencies and the selection of evaluators. Springfield, 3 PECBR at 1957-58.

Proposals concerning the basis for, and mechanics of, employee evaluations. East County Bargaining Council, 6 PECBR 5556.

Performance evaluation proposal that concerns uses and mechanics of evaluations and has the effect of allowing an arbitrator to substitute his judgment for the employer's concerning an employee evaluation rating. OPEU v. City of Tualatin, 8 PECBR 8214, 8221.

Facilities and Equipment:

Language committing the district to keep the schools equipped and maintained as agreed to in the contract. South Lane, 1 PECBR at 466.

Proposals which commit the district to keep the schools equipped and maintained as agreed to in the

conferences. Springfield, 1 PECBR at 358-59.

Decision to discontinue the off-duty use of state vehicles. Oregon State Police Officers Assn. v. State of Oregon Department of State Police, 9 PECBR 8794 at 8805 (1984). (Impact of decision is mandatory.)

Grievance/Arbitration: Proposal to subject an adverse evaluation to the grievance procedure. Gresham, 5 PECBR at 2783.

Proposals which seek to submit district policies or administrative decisions to binding third-party arbitration. Gresham, 5 PECBR 2784, Eugene Ed. Assn. v. Eugene Sch. Dist. 4J, on remand from court of appeals 6 PECBR 4703 (1981), aff'd 58 Or App 32 (1982).

Hiring: Proposal requiring the district to hire additional personnel to perform the nurse function when the assigned school nurse is assisting in health education within the school. Eugene, 1 PECBR 446, 453.

Proposal which would require the district to hire a minimum number of teacher aides. Springfield, 1 PECBR at 360.

Proposal requiring the district to hire a certain number of specialists and/or aides to assist teachers. Eugene, 1 PECBR at 450.

Layoff/Reduction in Force: Proposal prohibiting the layoff of any members of the bargaining unit until the association and the Board have reviewed the necessity

	and priorities of the educational program and the importance of budgeted items. Gresham, 5 PECBR 2771, 2804. (Standards for layoffs are a management prerogative.)
Manning/Staffing:	Proposal requiring a minimum number of deputies on patrol and in county jail. Polk County v. Polk County Deputy Sheriff's Assn., 5 PECBR 4641, 4649 (1981).
	Requirement that two officers be assigned to a patrol car between the hours of 10:00 p.m. and 6:00 a.m. Oregon State Police, 8 PECBR 7874 at 7909.
Personnel Files:	A proposal requiring a complete review of a teacher's personnel file prior to disciplinary action. Gresham, 5 PECBR 2771 at 2782.
	Language dictating the materials that should be placed in a teacher's personnel file. Springfield, 3 PECBR 1950.
Professional Development/ Training:	Language which outlines how an experimental program can be implemented and the amount to be spent for innovative programs. South Lane, 1 PECBR at 464.
	Language requiring a summer program for professional development, to be funded with a specified amount of budgetary resources. South Lane, 1 PECBR at 471-72.
	Language which would require the district to develop special programs through the

use of summer extended contract time. South Lane, 1 PECBR at 465.

Proposal guaranteeing a certain amount of "drill time" to fire prevention personnel and requiring that the training time be scheduled during the employee's workweek, at the cost of the employer. IAFF Local 314 v. City of Salem, 7 PECBR 5819 at 5829.

Proposal requiring that firefighters obtain CPI training outside of normally scheduled work hours. International Assn. of Firefighters, Local 314 v. City of Salem, 7 PECBR 5917, 5920 (1983).

Safety:

Proposal stating that it is the city's responsibility to continue to provide reasonable standards for safety concerning technology which is introduced by management and the manner in which police officers are expected to utilize the technology in an emergency situation. Salem Police Employees Union v. City of Salem, 8 PECBR 6642, 7910 (1984). (The use of the term "technology" made this proposal too broad to be consider mandatory. The term technology could encompass how, when and what equipment could be employed in any given situation.)

Proposal requiring that an employee who is working in an undercover assignment be provided with adequate backup support and equipment and that what constitutes adequate backup and equipment be determined by the employee involved and the

employer. If the employer and employee cannot agree on what constitutes adequate backup and support, the employee could refuse the assignment and would not be subject to discipline for such refusal. Oregon State Police, 8 PECBR 7874 at 7910.

Transfers and Vacancies:

Proposals for voluntary and involuntary transfers concerning the standards for transfer, the reasonableness of the standards and the assignment of teachers to specific positions. Springfield, 1 PECBR at 351.

Language requiring that all requests for transfer be satisfied before new personnel from outside the district are hired. Eugene, 1 PECBR at 452.

Requirement that notice of involuntary transfer be given no later than two weeks prior to the beginning of the contract year (or prior to any fixed deadline). Springfield, 1 PECBR at 351.

Proposal requiring that a teacher forced to transfer will be given priority in filling known vacancies. Springfield, 1 PECBR at 351.

Limiting involuntary transfer to a certain number of times within a given period of years. Springfield, 1 PECBR at 351.

Proposal requiring that teachers be granted a preparation day or workday prior to a transfer. Springfield Ed. Assn., 7 PECBR 6357 at 6395.

Proposal allowing teachers the right to visit their new assignment prior to an involuntary transfer. Springfield Ed. Assn., 7 PECBR at 6395.

Proposal requiring that the teacher transfer preference is determined through interviews. Springfield Ed. Assn., 7 PECBR 6357 at 6395.

Proposal requiring that the employer not transfer association representatives without the consent of the employee except in cases of promotion or necessity. Oregon State Police, 8 PECBR at 7888.

Vacations:

Proposals giving a beginning or ending date to vacation periods. Eugene, 6 PECBR at 4653-54.

Proposal requiring that up to one-sixth of the work force be allowed on vacation at one time. Firefighters Assn., Local 43, IAFF v. City of Portland, 8 PECBR 8466 at 8474-8475 (1986).

Scheduling of vacation time for firefighters providing the system does not unreasonably impinge on employees' ability to use accrued leave. Portland Fire Fighters Assn. v. City of Portland, 8 PECBR 8466 (1986).

Proposal providing that five employees on any single shift may be on vacation at one time. International Assn. of Firefighters, Local 314 v. City of Salem, 7 PECBR 5819 at 5827 (1983).

Working Conditions:

Class size restrictions. Springfield, 1 PECBR at

358. Proposal that supplemental preparation time be given when students are sent to the playground or other nonacademic activity. Eugene, 6 PECBR 4849, 4855.

Language requiring that preparation time be scheduled while students are in attendance. East County Bargaining Council, 6 PECBR 5556 at 5570.

Proposals indicating the total number of pupil contacts per day. Springfield, 1 PECBR at 361.

Proposal allowing police officers to take meal and rest breaks at their homes, if their home is within their assigned area. Oregon State Police Officers Assn., 9 PECBR 8794 at 8807.

Proposal requiring the state to publish objective criteria for promotions and to use the promotional roster for sergeant for 18 months. Oregon State Police, 8 PECBR 7874 at 7915. (This proposal is permissive because the position of sergeant was not in the bargaining unit.)

Proposal requiring that when shift strength is reduced or increased on holidays, assignments would be offered to the most senior employee, consistent with the needs of the employer. Oregon State Police, 8 PECBR at 7901.

Proposal requiring employer to provide 60 days' advance notice of its intent to reduce an employee's classification. OPEU v. City of Tualatin, 8 PECBR at 8221.

Work Schedules and Hours:	Language requiring preparation days to be scheduled at the beginning and end of grading periods. Yoncalla Sch. Dist. v. Lane Unified Bargaining Council, 7 PECBR 5786 (1983). (It should be noted that this portion of the Board's decision may have been overruled by Springfield Ed. Assn., 7 PECBR 6357.
	Proposal requiring that employees be given at least seven days' advance notice of a change in work schedules. Oregon State Police, 8 PECBR 7874 at 7890.
	A proposal that subject to the needs of the employer shift trading will be permitted. Oregon State Police, 8 PECBR 7874 at 7898. See, also, Oregon State Police Officers Assn., 9 PECBR 8794 (1986).
	A proposal setting forth specific starting and ending times of work shifts. International Assn. of Firefighters v. City of Salem, 7 PECBR 5819 at 5830.
Work Year:	The composition of workdays to include so many people days, so many holidays, so many teacher in service days. Springfield, 1 PECBR at 362-63.
	Teacher holiday and vacation periods. Scappoose Assn. of Classroom Teachers v. Scappoose School Dist., 5 PECBR 2819, 2826 (1980).

Prohibited Subjects

Union Shop:

Union shop proposals. OSTEA v. Oregon State University, 30 Or App 757 (1977).

Payment or Leave for Union Conferences:

Payment of a union representative for time spent at labor conventions. Clackamas IED Assn. v. Clackamas IED, 3 PECBR 1848 (1978).

Proposal that an employee be granted a leave of absence to serve as an officer or employee of a noncertified labor organization. Eugene Ed. Assn., 6 PECBR 4849 (1981).

Proposals for unpaid leave to attend conferences and workshops unless there is a requirement of a direct relationship between the workshop and the association's relationship with the employer. Eugene Ed. Assn., 5 PECBR 3004 (1980).

Proposal that employee union officials be granted 320 hours of leave per year to attend conferences or conventions of the organization of which the association is a member. Oregon State Police, 8 PECBR 7874 at 7888 (1985).

Requiring an employer to pay one-half of the salary or full benefits to a bargaining unit employee who takes a full-time position as a union officer. Petition for a Declaratory Ruling File by the City of Portland, 8 PECBR 8115 (1985).

Conflict with Statute:

Proposal that layoffs be determined on the basis of seniority alone. Greater

Sweet Home Area Ed. Assn. v. Sweet Home Sch. Dist., 6 PECBR 4832 (1981). (This proposal conflicted with a statute which provided for layoffs on the basis of merit and seniority.)

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